TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 499.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, ATTORNEY GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR, APPELLANT,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

FILED MAY 26, 1914.

(24238)

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1 *Transcript of record.*

Proceedings of the District Court of the United States for the Western District of Kentucky at a regular term begun and held at the Federal Court Hall, in the city of Louisville, on Monday, October 13th, A. D. 1913.

Present: Honorable Walter Evans, judge of the District Court of the United States for said district.

UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, Attorney General of the United States, plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, defendant.

Be it remembered, that heretofore, to wit, on the 7th day of February, 1914, came the plaintiff by George DuRelle, United States Attorney, and P. J. Farrell, solicitor of Interstate Commerce Commission, and filed in the clerk's office of said court its petition in the above-entitled cause.

Said petition above referred to is as follows:

2 No. 164.

In the District Court of the United States for the Sixth Circuit and Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, Attorney General of the United States, plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, DEFENDANT.

Petition.

To the honorable judges of the District Court of the United States for the Sixth Circuit and Western District of Kentucky:

Plaintiff, the United States of America, by James C. McReynolds, Attorney General of the United States, brings this, its petition, against the Louisville and Nashville Railroad Company, the above-named defendant, and thereupon complains and says:

That this suit is instituted in this court by the district attorney of the United States for said district of Kentucky, under the direction of the said Attorney General of the United States, at the request of the Interstate Commerce Commission of the United States;

That said Interstate Commerce Commission is an administrative tribunal, organized and existing under and by virtue of an act entitled "An act to regulate commerce," approved February 4, 1887, as amended, including amendments known as the Hepburn law, approved June 29, 1906, and the Mann-Elkins law, approved June 18, 1910;

3 That said defendant is a corporation, organized and existing under and by virtue of the laws of the State of Kentucky; that

its principal office is located at Louisville, in said State; that it is engaged as a common carrier in the transportation of passengers and property by railroad, in interstate commerce, among the several States and Territories of the United States, including the State of Kentucky in said district, and that it is subject to said act to regulate commerce and amendments thereof and supplements thereto.

That by section 20 of said act, as amended, it is provided: That said Interstate Commerce Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to said act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys; that said commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to said act; that it shall be unlawful for such carriers to keep any accounts, records, or memoranda other than those prescribed or approved by said commission; that said commission may employ special agents, or examiners, who shall have authority under the order of said commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers; that in cases of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda on the books and in the manner prescribed by said commission, or to submit such accounts, records, and memoranda as are kept to the inspection of said commission, or any of its authorized agents or examiners, such carrier shall forfeit to the United States the sum of five hundred dollars for each such offense, and for each and every day of the continuance of such offense; that any person who shall willfully make any false entry in the accounts of any book of accounts, or in any record or memoranda kept by such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such ac-
4 count, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to such carrier's business, or shall keep any accounts, records, or memoranda other than those prescribed or approved by said commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment; that the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of said commission, alleging a failure to comply with or a violation of any of the provisions of said act, or of any amendment thereof, or supplement thereto, by any common carrier subject to said act, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said act, and of the amendments thereof and supplements thereto, or any of them, and that, for the purpose of carrying out and giving effect to the provi-

sions of said act and said amendments and supplements, said commission is authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

That by section 12 of said act, as amended, said commission is authorized and required: To inquire into the management of the business of all common carriers subject to the provisions of said act, to keep itself informed as to the manner and method in which said business is conducted; to obtain from such common carriers full and complete information necessary to enable said commission to perform the duties and carry out the objects for which it was created, and to execute and enforce the provisions of said act.

That by said section 12 it is provided that, upon the request of said commission, it shall be the duty of any district attorney of the United States to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of said act and for the punishment of all violations thereof;

That on the sixth day of November, 1913, a resolution was considered by unanimous consent in the Senate of the United States, and agreed to by said Senate, in words and figures as follows, to wit:

"RESOLUTION.

Resolved, That the Interstate Commerce Commission be, and the same is hereby, directed to investigate, taking proof and employing counsel if necessary, and report to the Senate as soon as practicable—

First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;

Second. What other railroad or railroads in the territory served by the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with, for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga and Saint Louis Railway;

Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

Fourth. Any other fact or facts showing or tending to show the further relations between the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and

what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad, and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad, or any of its subsidiaries, or holding companies;

Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory, in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

Seventh. Any other fact or facts showing or tending to show, the further relations between the Louisville and Nashville Railroad, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or facts showing, or tending to show, whether these relations restrict competition and maintain and fix rates;

Eighth. Any fact or facts showing, or tending to show, (a) the relations between the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah and Alabama Railroad, and any other railroads that have been purchased or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and, (b) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia, and the arrangement made between the Louisville and Nashville and the Nashville, Chattanooga and Saint Louis Railway by which the former uses the tracks of the said Western and Atlantic Railway restrict competition, restrain trade, and determine and fix rates;

Ninth. Any fact or facts showing, or tending to show, whether the ownership of the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway of any railroad terminals or terminal companies, steamboats and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dock yards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly and restricts competition and determines and fixes rates;

Tenth. Any fact or facts showing, or tending to show, whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

Eleventh. What amount of stock, if any, the Atlantic Coast Line Company, or Atlantic Coast Holding Company owns in the Louisville and Nashville Railroad, and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates;

Twelfth. What amount, if any, the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, all or any of them, have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

Thirteenth. (a) The number of free annual passes; (b) the number of free-trip passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials, or at the request of members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads."

That prior to the times hereinafter mentioned, said commission, for the purpose of enabling it to perform the duties imposed upon it by said act as aforesaid, duly appointed two special agents and examiners, namely, Will H. Carleton and Paul H. Lawrence, and duly authorized them to inspect and examine the accounts, records, and memoranda of said defendant, and said Carleton and Lawrence continuously since said appointment have been, and still are, duly appointed and authorized agents and examiners of said commission, with authority as aforesaid;

That heretofore, to wit, on the 4th day of February, 1914, the said commission, by and through said Carleton, agent and examiner as aforesaid, applied to and made demand of said defendant, and to and of its first vice president, W. L. Mapother, the officer of said defendant in charge and control of the accounts, records, and memoranda of said defendant, and to and of other officers and agents of said defendant for access to and opportunity to examine the accounts, records, and memoranda kept by said defendant prior to August 28, 1906, and the said defendant and said Mapother, vice president as aforesaid, and said other officers and agents of defendant, failed and refused to comply with the provisions of said act to

regulate commerce, and violated the provisions of said act, and failed and refused to give, either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine said accounts, records, and memoranda of said defendant made prior to said August 28, 1906;

And that heretofore, to wit, on February 4, 1914, said commission, by and through said Carleton, agent and examiner as aforesaid, applied to and made demand of said defendant, and to and of its first vice president, W. L. Mapother, the officer of said defendant in charge and control of the accounts, records, and memoranda of said defendant, and to and of other officers and agents of said defendant for access to and opportunity to examine the accounts, records, and memoranda kept by said defendant on and subsequent to said August 28, 1906, including the correspondence received by said defendant on and subsequent to said date and copies of the correspondence sent out by said defendant on and subsequent to said date, and also the indexes pertaining to said correspondence and copies of correspondence, and that said defendant and said Mapother, vice president as aforesaid, and said other officers of said defendant, failed and refused to comply with the provisions of said act to regulate commerce and violated the provisions of said act, and failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine said accounts, records, and memoranda of said defendant; that is to say, that said defendant and its said officers and agents failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine said correspondence received by said defendant on and subsequent to said August 28, 1906, or the copies of correspondence sent out by said defendant on and subsequent to said date, or the indexes kept with respect to said outgoing and incoming correspondence by said defendant, and said defendant and its said officers and agents failed and refused to give, either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine other accounts, records, and memoranda of said defendant made on and subsequent to said August 28, 1906.

That in pursuance of said commission's duty under the law, and in obedience to said resolution of the Senate hereinbefore set out, and to enable said commission to perform the functions for which it was created, it became and was the duty of said commission to obtain access to, and to examine, by and through its special agents and examiners as aforesaid, all of said accounts, records, and memoranda, including said correspondence, copies of correspondence, and indexes thereto, and it became and was the duty of said defendant and its officers and agents to give access to said commission and its agents and examiners to said accounts, records, memoranda, correspondence, copies of correspondence and indexes, and to give to said commission and said agents and examiners opportunity to ex-

amine and inspect said accounts, records, memoranda, correspondence, copies, and indexes.

Wherefore, plaintiff prays the court to issue a writ of mandamus, commanding said Louisville and Nashville Railroad Company, common carrier as aforesaid, to comply with said provisions of said acts of Congress, and to give access to the accounts, records, and memoranda of said defendant and the said correspondence, copies of correspondence, and indexes thereto, and to afford opportunity to examine the same to said commission and its said agents and examiners, and to give such access to and opportunity to examine the said accounts, records, and memoranda made and kept by and for
11 said defendant both before, on, and subsequent to August 28, 1906, including correspondence, copies of correspondence, and indexes thereto, and other indexes to said accounts, records, and memoranda, and plaintiff prays for all proper relief.

GEORGE DURELLE,
United States Attorney, Western District of Kentucky, Louisville, Ky.
P. J. FARRELL,
Solicitor of Interstate Commerce Commission, Washington, D. C.
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
Western District of Kentucky, Set:

George DuRelle states that he is attorney of the plaintiff, United States of America, and that the statements contained in the foregoing petition are true.

GEORGE DURELLE.

Subscribed and sworn to before me by George DuRelle this 7th day of February, 1914.

A. G. RONALD, *Clerk.*

12 And on the 17th day of March, 1914, the defendant, Louisville and Nashville Railroad Company, filed in said cause its answer, in words and figures as follows:

District Court of the United States, Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, Attorney General of the United States, plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, DEFENDANT.

Answer.

Defendant, Louisville & Nashville Railroad Company, for answer to the petition herein says:

PARAGRAPH I.

As to the requirements of the act to regulate commerce, and other statutes referred to in the petition, and as to the rights and duties

of persons thereunder, defendant submits that these are questions of law, and that defendant is not required to admit or deny plaintiff's allegations concerning the same.

As to the general allegations of the petition, to the effect that defendant has failed and refused to comply with the provisions of the act to regulate commerce and has violated the provisions thereof, defendant submits that said allegations are too vague and general to require or permit of any response from it.

13 Defendant denies that on February 4, 1914, or at any time prior to the institution of this action, it failed or refused to give, either to the Interstate Commerce Commission, or to Carleton, its agent and examiner, access to or opportunity to examine any accounts, records, of memoranda of defendant made on or since August 28, 1906.

Defendant says, as a matter of grace, it did, prior to the filing of this suit, give said examiners access to correspondence, other than privileged communications, but after this suit it did refuse, and now refuses, to give either to said commission, or to said Carleton, access to or opportunity to examine correspondence received by defendant before, on, or subsequent to August 28th, 1906, or copies of correspondence sent out by defendant before, on, or subsequent to said date, or the indexes kept with respect to said outgoing and incoming correspondence by defendant (except correspondence as to passes issued since January 1, 1911, as set forth in paragraph four hereof).

Defendant says its said correspondence contains private and confidential communications between its various officers and agents regarding various matters that do not in any way pertain to the provisions of the act to regulate commerce and the acts amendatory thereof, nor to any other act of Congress, the provisions of which it is made the duty of the Interstate Commerce Commission to enforce. Said correspondence contains communications of a private and confidential nature between the president of defendant and the heads of the various departments of defendant's organization, relative to its internal affairs; as to its proposed constructions and extensions in the future; and as to its policies with competing and rival roads; as to its relations with labor organizations represented in its operating department; and as to a variety of other subjects of a private and confidential nature, and that do not relate to the provisions of the act to regulate commerce and acts amendatory thereof, nor to any other act of Congress as to the enforcement of which any

14 duty has been imposed upon the Interstate Commerce Commission. And said correspondence also contains confidential, private, and privileged communications between defendant and its attorneys at law.

Section 20 of the act to regulate commerce provides that the commission may, in its discretion, prescribe the form of any and all accounts, records, and memoranda to be kept by carriers subject to the act, including the accounts, records, and memoranda of the move-

ment of traffic as well as the receipts and expenditures of moneys, and that the commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to said act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the commission, and it may employ special agents or examiners, who shall have authority under the order of the commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers.

Defendant states that under said provision of the act the Interstate Commerce Commission has prescribed a uniform system of railway accounting, including the following order, to wit:

1. Classification of operating revenues, effective July 1, 1907; supplemented by an order effective July 1, 1908, known as the "Supplement to the first issue of the classification of operating revenues."

2. First revised issue of the classification of expenditures for road and equipment, made effective July 1, 1907, to which a supplement was issued by an order effective July 1, 1908, known as the "Supplement to the first revised issue of the classification of expenditures for road and equipment."

3. Third revised issue of the classification of operating expenses, made effective July 1, 1907, to which a supplement was issued, made effective July 1, 1908.

15 4. Classification of revenues and expenses for outside operations, made effective July 1, 1908.

5. First issue of the classification of locomotive miles, car-miles, and train-miles, made effective July 1, 1907.

6. Form of general balance-sheet statement, made effective June 15, 1910.

7. Classification of expenditures for additions and betterments, made effective July 1, 1910.

8. Form of income and profit and loss statement for the use of carriers, made effective July 1, 1912.

Defendant therefore states that under section 20 of the interstate commerce act, the commission has prescribed in detail a general accounting system for all carriers subject to the provisions of said act. Defendant has complied with all of said forms that have been prescribed by said commission, and the commission and its examiners have had full and complete access to same.

Said commission has never pretended to prescribe any forms for correspondence between the officials of the various departments of defendant, nor for correspondence between such officials and its patrons and the general public, and obviously forms for correspondence could not be prescribed, and any attempt to prescribe such forms would be manifestly absurd.

16 PARAGRAPH II.

The defendant further states that if the act to regulate commerce, as amended, properly construed, is intended to gra[illegible] to the

said commission, its examiners or agents, the right of access to, and the right to examine or inspect at will, any or all "accounts, records, and memoranda," and all correspondence received, and all copies of correspondence sent out by the defendant or its officials in the manner and as set out and claimed in the petition herein, then the exercise of such alleged right, in that respect, would amount to and operate as an unreasonable search and seizure of the private papers of the defendant, and the provisions of said act, thus construed, would, to that extent, be, and they are, in violation of the provisions of the fourth amendment to the Constitution of the United States, which are pleaded are relied on by defendant in bar of the petition and the relief prayed therein.

PARAGRAPH III.

The order of the Interstate Commerce Commission, dated November 10, 1913, by and under which the investigation referred to in the petition herein was commenced and is being conducted by said commission, was made in Investigation No. 6319, under Resolution No. 153 of the Senate of the United States, adopted November 6, 1913, which order (a copy of which was duly served upon this defendant by said commission at the beginning of said investigation) is in words and figures as follows, to wit:

17 ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of November, A. D. 1913.

EDGAR E. CLARK,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
JAMES S. HARLAN,
CHARLES C. MCCHORD,
BALTHASAR H. MEYER,
JOHN H. MARBLE,
Commissioners.

No. 6310.

In re financial relations, rates, and practice of the Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and other carriers.

The United States Senate having, by Resolution No. 153, adopted November 6, 1913, directed the Interstate Commerce Commission to investigate, take proof, and report to the Senate as soon as practicable—

First. What amount of stocks, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;

Second. What other railroad or railroads in the territory served by the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with, for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga and Saint Louis Railway;

18 Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

Fourth. Any other fact or facts showing, or tending to show, the further relations between the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing, or tending to show, whether these relations restrict competition and maintain fixed rates;

Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad, and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad, or any of its subsidiaries or holding companies;

Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

Seventh. Any other fact or facts showing, or tending to show, the further relation between the Louisville and Nashville Railroad, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or facts showing, or tending to show, whether these relations restrict competition and maintain and fix rates;

Eighth. Any fact or facts showing, or tending to show, (a) the relations between the Louisville and Nashville Railroad; the Nashville, Chattanooga and Saint Louis Railway; the Tennessee

19 Midland Railroad; the Tennessee, Paducah, and Alabama Railroad, and any other railroads that have been purchased or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and (b) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia, and the arrangement made between the Louisville and Nashville and the Nashville, Chattanooga and Saint Louis Railway, by which the former uses the tracks of the said Western and Atlantic Railway, restrict competition, restrain trade, and determine and fix rates;

Ninth. Any fact or facts showing, or tending to show, whether the ownership of the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway of any railroad termi-

nals or terminal companies, steamboats, and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dock yards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly and restricts competition and determines and fixes rates;

Tenth. Any fact or facts showing, or tending to show, whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

Eleventh. What amount of stock, if any, the Atlantic Coast Line Company or Atlantic Coast Holding Company owns in the Louisville and Nashville Railroad and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority
20 of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates;

Twelfth. What amount, if any, the Louisville and Nashville Railroad; the Nashville, Chattanooga and Saint Louis Railway; the Nashville and Decatur Railroad; and the Lewisburg and Northern Railroad, all or any of them, have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

Thirteenth. (a) The number of free annual passes; (b) the number of free trip passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials or at the request of members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued upon each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads;

It is ordered, that a proceeding of inquiry and investigation be, and the same is, hereby instituted into and concerning the several matters and things set forth and referred to in the said resolution.

It is further ordered, that this proceeding be set for hearing at such times and places, and that such persons be required to appear and testify, or to produce books, documents, and papers, as the commission may hereafter direct; and that the investigation be carried on in the meantime by such other means and methods
21 as may be deemed appropriate.

And it is further ordered, that a copy of this order be served upon each of the following-named railroad companies and

upon any other companies which may hereafter be designated by the commission:

Nashville, Chattanooga & St. Louis Railway;
Louisville & Nashville Railroad Company;
Nashville & Decatur Railroad Company;
Lewisburg & Northern Railroad;
Tennessee Midland Railroad Company;
Tennessee, Paducah & Alabama Railroad;
Western & Atlantic Railroad; and
Atlantic Coast Line Railroad Company.

The defendant submits that the subject matter of neither of the first twelve paragraphs of said resolution is within the powers or jurisdiction of the Interstate Commerce Commission, nor within the scope and purposes of the act to regulate commerce as amended, nor can the same be made the subject of a complaint under the provisions of said act before, or of an investigation and report by, said commission, or be made the basis or grounds for the examination or inspection by said commission, its examiners or agents, of any of the "accounts, records, or memoranda," correspondence, copies of correspondence kept by the defendant, either on, before, or since August 28, 1906; nor is the commission, or any of its examiners or agents, entitled to access to any of the "accounts, records, or memoranda," correspondence, copies of correspondence, or the indexes thereto, or the production of any part thereof, in so far as the subject-matter of either of said twelve paragraphs of said resolution is concerned.

22 PARAGRAPH IV.

The defendant further states that so far as the subject matter of the thirteenth paragraph of said Senate resolution, which relates to free passes issued since January 1, 1911, by the defendant to public officials and members of legislative bodies is concerned, the defendant has not heretofore refused, but permitted, the said commission, its examiners, and agents, on their request, to have access to and to examine and inspect all "accounts, records, and memoranda" relating to such passes, whether interstate or intrastate, and also all correspondence relating to such passes (although defendant claims that the commission had no legal right to examine any of said correspondence, nor to examine any intrastate passases, or any accounts, records, and memoranda pertaining thereto).

Wherefore defendant prays to be hence dismissed with its costs.

H. L. Stone,
Helm Bruce,
E. S. Jouett,
W. A. Colston,
Attorneys for Defendant.

STATE OF KENTUCKY,
County of Jefferson, Sct:

Affiant, M. H. Smith, states that he is the president of defendant, the Louisville & Nashville Railroad Company, and that the statements of the foregoing answer are true, as he believes.

M. H. SMITH.

Subscribed and sworn to before me by M. H. Smith this 17th day of March, 1914. My commission expires January 30, 1916.

GEO. R. EWALD,
Notary Public, Jefferson County, Ky.

23 And on March 19th, 1914, the plaintiff filed herein its motion for a mandamus, in words and figures as follows:

No. 164.

In the District Court of the United States for the Sixth Circuit and Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. McReynolds, Attorney General of the United States, plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, defendant.

The plaintiff moves the court to issue a writ of mandamus commanding said defendant, said Louisville and Nashville Railroad Company, to comply with the provisions of the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and the acts amendatory and supplementary to said act, and to give to the Interstate Commerce Commission of the United States and to the agents and examiners of said commission, and to Will H. Carleton, agent and examiner of said commission, access to and opportunity to inspect and examine the accounts, records, and memoranda of said defendant, including the correspondence, copies of correspondence, and indexes thereto, and other indexes to said accounts, records, and memoranda made and kept by and for said defendant both before, on, and subsequent to August 28, 1906.

GEORGE DURELLE,
P. J. FARRELL,
Counsel for Plaintiff.

24 And on another day of said term, to wit, on March 23rd, 1914, the following proceedings were had:

No. 164.

In the District Court of the United States for the Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, Attorney General of the United States, plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, defendant.

This cause coming on for hearing on the plaintiff's motion, filed herein March 19th, 1914, for a mandamus in accordance with the prayer of its petition, the plaintiff temporarily withdrew said motion and introduced Will H. Carleton as a witness on its behalf, who was duly sworn and whose testimony was heard. The plaintiff thereupon renewed the motion for a mandamus, entered on March 19th, 1914, and the testimony offered by the plaintiff and defendant having been heard and the cause having been argued by George Du Relle, district attorney, and P. J. Farrell on behalf of the plaintiff, and by Helm Bruce and E. S. Jouett on behalf of the defendant, and the court, not being sufficiently advised on said motion, takes time to consider same.

25 And on another day of said term, to wit, March 25th, 1914, the following proceedings were had:

164.

District Court of the United States, Western District of Kentucky.

UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, Attorney General, plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, defendant.

Judgment.

This action having been heard and submitted in chief upon the pleadings and evidence herein and the arguments of counsel, and the court being sufficiently advised, delivered a written opinion which was filed, and pursuant thereto it is now considered, ordered, and adjudged by the court that plaintiff's motion for a mandamus be, and it is hereby, denied and that its petition herein be, and it is hereby, dismissed without prejudice; to all of which plaintiff excepts.

The opinion above referred to is as follows:

26 #164.

United States District Court, Western District of Kentucky.

UNITED STATES, BY ITS ATTORNEY GENERAL,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Opinion.

The act to regulate commerce, after providing (section 1) that it shall apply to any common carrier or carriers engaged in the transportation of passengers or property from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States, or to any adjacent foreign country, but that its provisions should not apply to the transportation of passengers or property wholly within any State, provides that all charges for such transportation shall be reasonable and just, that all classifications of property for transportation shall be just and reasonable, and (sections 2 and 3) that unjust discrimination shall be unlawful, and that no undue or unreasonable preference shall be given to any shipper, and (section 5) that it shall be unlawful to pool freights, and the Interstate Commerce Commission is given authority to determine questions of competition or possible competition. By section 6 it is provided that certain schedules of rates, fares, and charges shall be filed and established, and that due notice thereof shall be given. Section 6 also provides that every common carrier subject to the act shall file with the Interstate Commerce Commission copies of all contracts, agreements, or arrangements with other common carriers of any arrangements affected by
27 the act, and also provides that no common carrier shall engage in such transportation unless it files and publishes such schedules of rates. The Interstate Commerce Commission established by the act is given wide and extensive powers, among which (section 12) is the authority to inquire into the management of the business of all common carriers subject to the provisions of the act, and the commission is required to keep itself informed as to the manner and method in which such business is conducted, with the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created, and, upon the request of the commission, it is made the duty of the district attorney of the United States to whom it may apply to institute in the proper court necessary proceedings for the enforcement of all the provisions of this act for the punishment of all violations thereof. By section 20 the commission is authorized to require from all carriers subject

to the act annual reports, and it may prescribe the method of making them, and such annual reports are required to show in detail its capital stock and many other items specified in that section. This section further provides that the commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of the act, including the accounts, records, and memoranda of the movement of traffic as well as receipts and expenditures of money. The commission is authorized at all times to have access to all accounts, records, and memoranda kept by carriers subject to the act, and it is provided that it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the commission, and the commission is authorized to employ special agents or examiners who shall have authority under the order of the commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. The section prescribes
28 penalties for the failure on the part of the carrier to keep such accounts, records, and memoranda on such books as may be prescribed by the commission, or for a refusal to submit such accounts, records, or memoranda as are kept to the inspection of the commission or any of its authorized agents or examiners. This section contains a clause which reads thus:

"That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of said act to regulate commerce or of any act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus, commanding such common carrier to comply with the provisions of said acts or any of them."

On February 7th, 1914, the United States, by its Attorney General, filed in this court a petition in which, among other things, it is alleged:

"That by section 12 of said act, as amended, said commission is authorized and required: To inquire into the management of the business of all common carriers subject to the provisions of said act, to keep itself informed as to the manner and method in which said business is conducted; to obtain from such common carriers full and complete information necessary to enable said commission to perform the duties and carry out the objects for which it was created; and to execute and enforce the provisions of said act.

"That by said section 12 it is provided that upon the request of said commission it shall be the duty of any district attorney of the United States to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions
29 of said act and for the punishment of all violations thereof;

"That on the sixth day of November, 1913, a resolution was considered, by unanimous consent in the Senate of the United States, and agreed to by said Senate, in words and figures as follows, to wit:

"RESOLUTION.

"Resolved, That the Interstate Commerce Commission be, and the same is hereby, directed to investigate, taking proof and employing counsel if necessary, and report to the Senate as soon as practicable—

"First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;

"Second. What other railroad or railroads in the territory served by the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with, for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga and Saint Louis Railway;

"Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

"Fourth. Any other fact or facts showing or tending to show the further relations between the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

"Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad or any of its subsidiaries or holding companies;

"Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

"Seventh. Any other fact or facts showing, or tending to show, the further relations between the Louisville and Nashville, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or facts showing, or tending to show, whether these relations restrict competition and maintain and fix rates;

"Eighth. Any fact or facts showing, or tending to show, (a) the relations between the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah and Alabama Railroad, and any other railroads that have been purchased or leased by either or both

of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and (b) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia, and the arrangement made between the Louisville and Nashville, and the Nashville, Chattanooga and Saint Louis Railroad, by which the former uses the tracks of the said Western and Atlantic Railway, restrict competition, restrain trade, and determine and fix rates;

"Ninth. Any fact or facts showing, or tending to show, whether the ownership of the Louisville and Nashville Railroad and
31 the Nashville, Chattanooga and Saint Louis Railway of any railroad terminals or terminal companies, steamboats, and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dock yards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly and restricts competition and determines and fixes rates;

"Tenth. Any fact or facts showing, or tending to show, whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement:

"Eleventh. What amount of stock, if any, the Atlantic Coast Line, or Atlantic Coast Holding Company owns in the Louisville and Nashville Railroad, and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates:

"Twelfth. What amount, if any, the Louisville and Nashville Railroad; the Nashville, Chattanooga and Saint Louis Railway; the Nashville and Decatur Railroad; and the Lewisburg and Northern Railroad, all or any of them, have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

"Thirteenth. (a) The number of free annual passes; (b) the number of free-trip passes; (c) the number of every kind of
32 free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads.

"That prior to the times hereinafter mentioned said commission, for the purpose of enabling it to perform the duties imposed upon it by said act as aforesaid, duly appointed two special agents and examiners, namely, Will H. Carleton and Paul H. Lawrence, and duly authorized them to inspect and examine the accounts, records, and memoranda of said defendant, and said Carleton and Lawrence continuously since said appointment have been, and still are, duly appointed and authorized agents and examiners of said commission, with authority as aforesaid;

"That heretofore, to wit, on the 4th day of February, 1914, the said commission, by and through said Carleton, agent and examiner as aforesaid, applied to and made demand of said defendant, and to and of its first vice president, W. L. Mapother, the officer of said defendant in charge and control of the accounts, records, and memoranda of said defendant, and to and of other officers and agents of said defendant, for access to and opportunity to examine the accounts, records, and memoranda kept by said defendant prior to August 28, 1906, and the said defendant and said Mapother, vice president as aforesaid, and said other officers and agents of defendant failed and refused to comply with the provisions of said act to regulate commerce, and violated the provisions of said act, and failed and refused to give either to said commission or to said Carleton, agent and examiner aforesaid, access to or opportunity to examine said accounts, records, and memoranda of said defendant made prior to said August 28, 1906;

33 "And that heretofore, to wit, on February 4, 1914, said commission, by and through said Carleton, agent and examiner as aforesaid, applied to and made demand of said defendant and to and of its first vice president, W. L. Mapother, the officer of said defendant in charge and control of the accounts, records, and memoranda of said defendant, and to and of other officers and agents of said defendant for access to and opportunity to examine the accounts, records, and memoranda kept by said defendant on and subsequent to said August 28, 1906, including the correspondence received by said defendant on and subsequent to said date and copies of the correspondence sent out by said defendant on and subsequent to said date, and also the indexes pertaining to said correspondence and copies of correspondence, and that said defendant and said Mapother, vice president as aforesaid, and said other officers of said defendant failed and refused to comply with the provisions of said act to regulate commerce, and violated the provisions of said act, and failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine said accounts, records, and memoranda of said defendant; that is to say, that said defendant and its said officers and agents failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine said correspondence received by said defendant on and subsequent to said August 28, 1906, or the copies of correspondence

sent out by said defendant on and subsequent to said date, or the indexes kept with respect to said outgoing and incoming correspondence by said defendant, and said defendant and its said officers and agents failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine other accounts, records, and memoranda of said defendant made on and subsequent to said August 28, 1906.

34 "That in pursuance of said commission's duty under the law, and in obedience to said resolution of the Senate hereinbefore set out, and to enable said commission to perform the functions for which it was created, it became and was the duty of said commission to obtain access to and to examine by and through its special agents and examiners as aforesaid, all of said accounts, records, and memoranda, including said correspondence, copies of correspondence and indexes thereto, and it became and was the duty of said defendant and its officers and agents to give access to said commission and its agents and examiners to said accounts, records, memoranda, correspondence, copies of correspondence and indexes, and to give to said commission and said agents and examiners opportunity to examine and inspect said accounts, records, memoranda, correspondence, copies, and indexes.

"Wherefore, plaintiff prays the court to issue a write of mandamus commanding said Louisville and Nashville Railroad Company, common carrier as aforesaid, to comply with said provisions of said acts of Congress, and to give access to the accounts, records, and memoranda of said defendant and the said correspondence, copies of correspondence and indexes thereto, and to afford opportunity to examine the same to said commission and its said agents and examiners, and to give such access to and opportunity to examine the said accounts, records, and memoranda made and kept by and for said defendant both before, on, and subsequent to August 28, 1906, including correspondence, copies of correspondence, and indexes thereto, and other indexes to said accounts, records, and memoranda, and plaintiff prays for all proper relief."

35 The defendant's answer contains four separate paragraphs, each of which states a separate matter of defense. Their substance may, we think, be succinctly, and for the present purpose sufficiently, stated as follows:

1st. The first paragraph, after certain denials, states facts upon which the defendant insists that it had exhibited to the agent of the Interstate Commerce Commission all the accounts, records, and memoranda, and other papers which the law required it to show, and had withheld none which it was its duty to exhibit. It avers that it was not required to do so, and for that and other reasons it did not exhibit various papers described in general terms which the law did not require it to show the examiner, many of which were privileged communications between the various departments of its official work, including those between the defendant and its attorneys, but which had no relation to anything coming within the act.

2nd. The defendant, in paragraph two of its answer, pleads exemption under the fourth of the articles of amendments to the Constitution of the United States from the searches sought to be made by the examiner upon the ground that those searches are unreasonable.

3rd. The third paragraph sets up the order of the Interstate Commerce Commission made on November 10th, 1913, and which was served on defendant on November 13th, and which order directed certain steps to be taken in order to carry into effect the resolution passed by the Senate and set forth in plaintiff's petition. This order, it is claimed, has not been followed by the examiner in this instance, and,

4th. The answer endeavors to show that the defendant had fully complied with the demand of the commission and its examiner in respect to the free passes it had issued since January 1, 1911, by giving to the examiner a full exhibition of all the facts in respect thereto.

36 In the view we feel compelled to take of the case, we think it unnecessary to dwell upon the defense set up in paragraph 2 of the answer, in respect to the fourth amendment to the Constitution.

With equal brevity may we dispose of the fourth defense, because it is admitted at the bar that so far as the inquiry respecting the free passes is concerned, full and satisfactory information has been given to the examiner by the defendant.

This leaves for consideration only the defense set up in the first and that set up in the third paragraphs of the answer.

We shall state with brevity our views upon each of these defenses, circumstances not favoring an elaborate discussion of them, even if that were necessary or desirable. Indeed, the third paragraph may be easily disposed of:

In the case of Hein vs. The Levee Commissioners, 19 Wall., at page 660, the Supreme Court, speaking through Mr. Justice Miller, said:

"Mandamus is essentially and exclusively a common-law remedy and is unknown to the equity practice. But if this were otherwise, it is the well-settled doctrine of this court that the circuit courts can not use the writ of mandamus as an original and independent remedy, but are limited to its use as a process in the enforcement of rights when jurisdiction has been already acquired for other purposes."

This is the general rule, but the act to regulate commerce gives the court jurisdiction and power to issue writs of mandamus in certain cases for the enforcement of the act, but in no way can it be construed to confer upon the court power to enforce by that writ a resolution of the Senate alone, such resolution being no part of the act and not being a law of the United States. This was so obvious that the learned district attorney frankly admitted that the Senate resolution could not be enforced in that manner, and in open court dis-

37 claimed any purpose to seek relief upon that ground.

In these circumstances we may lay to one side the Senate resolution as such, though if there can be found in it anything which also comes within the provisions of the act to regulate commerce, the relief sought in this case might be grantable, even if the Senate resolution also contained it. A careful examination of the plaintiff's petition, the act to regulate commerce, and the Senate resolution has resulted in the conclusion that, except in the 13th clause of the Senate resolution, which relates to the inquiry as to free passes issued, that resolution, under no admissible interpretation, relates to interstate commerce as regulated by the act. It relates possibly to other legislation, such as the anti-trust act, but not to the act regulating commerce between the States. This being so, that clause of the act to regulate commerce which gives the court power to issue writs of mandamus does not embrace a case outside the latter act.

As in the Harriman case, 211 U. S., 417, et seq., it is claimed here that the general language of the act confers unlimited authority upon the Interstate Commerce Commission and its agents, whether or not the court can see how what is demanded affects interstate commerce. In the opinion in that case Mr. Justice Holmes gave a graphic description of the broad construction insisted upon by the commission, and indeed it must be confessed that much support to these claims has been given by the Supreme Court in other cases, and by Congress. We think it not unlikely that there are few limits which can safely be fixed by the lower Federal courts upon the operation of the clause of the act bestowing power upon the commission. Nevertheless, we think it clear that the Senate resolution, not being a law, can not bring this case within section 20 of the act to regulate commerce in respect to the writ of mandamus. Whatever the Senate itself might do in other directions, in order to obtain the in-
38 formation it desires, the courts have no authority to aid its resolution by issuing a writ of mandamus. This being so, we shall confine our examination to the question, whether, when all that relates to the Senate resolution is taken out of the plaintiff's petition anything sufficiently appears to entitle it to the relief it seeks. Several propositions may be considered as bearing upon the general result, and each will be briefly noticed:

(a) The principle that communications between an individual and his counsel are privileged has been so often and so long held that it will take a court higher than this to upset so old, so necessary, and so wise a principle. That this principle is imbedded in our jurisprudence is clear from cases like Connecticut Mutual Life Insurance Co. vs. Schaefer, 94 U. S., 458, and many others which might be cited. We need not further elaborate this proposition, but conclude that the 4th amendment to the Constitution and general principles of sound jurisprudence should prevent the issuing of any writ of mandamus which would require the production of papers or statements within the purview of the rule we have stated. The

intention of Congress to abrogate the rule has not been made manifest, and will not be presumed.

(b) The question whether the provisions of the so-called Hepburn Act, which authorizes the commission to require the production of accounts, records, and memoranda, should so far have a retrospective effect as to authorize the commission to enforce such production if the accounts, records, and memoranda were made previous to August 28, 1906, when the Hepburn Act went into effect, was argued with great ability. The general rule is that statutes are presumed to be prospective in operation, and the courts will refuse to give a retrospective effect to them unless the intention to the contrary is so clear and positive as by no reasonable possibility to admit of any other construction. But whether this general principle should be applied here admits of enough doubt to incline us to pass the
39 question by, inasmuch as its definite settlement is not essential to the decision of the case.

(c) But granting a writ of mandamus is always matter of sound discretion. To say the least, there certainly is grave doubt whether the court can compel the defendant to exhibit those papers to the commission which are ordinarily held to be privileged, such as communications between client and attorney.

There is grave doubt, also, whether a proper interpretation of the Hepburn Act should so far give it a retrospective operation at this late day as to authorize the court to compel the defendant to produce papers which had their origin before that act went into effect in August, 1906, and with all the allegations of plaintiff's petition in reference to the Senate's resolution elimited, as we think should be and has been done, we have concluded that the writ of mandamus can not be properly or discreetly based upon the extremely vague allegations which will then alone remain in the plaintiff's petition and which insist upon the production of all the papers as to which we have indicated the doubts just expressed.

It is difficult in these circumstances to see how there could be any such definite and distinct directions to the defendant as would guard its rights while at the same time enforcing the performance of its duties. We think the court, in its discretion, should not grant the writ unless it can clearly and definitely define the duty it imposes upon the person it commands. This the court can not do under the vague and general allegations of the petition. All these reasons combined have lead us to the conclusion that the motion of the plaintiff should be denied.

We think, also, that the action should be dismissed. As already indicated, the allegations of plaintiff's petition are too meager and too vague, after everything in the case respecting the
40 Senate resolution has been eliminated, to fairly afford a basis of any specific relief. If that pleading had stated with clearness, though necessarily in general terms, the exact records or papers of the defendant an examination of which had been demanded and refused, and so that the court might see from plaintiff's pleading or

from the testimony what portions of them might (if the descriptions were accurate) be privileged and what not, or what part of them might be within the act and what not, we might be able to direct in a writ of mandamus what parts of such records should be exhibited to the examiner and what not. But the meager, vague, and extremely general statements now remaining in the pleading, even when considered in connection with the testimony, do not disclose in adequate form information sufficient to enable the court to act in determining the questions of importance to which it is asked to respond. To grant the writ in the broad and general, not to say unlimited, terms asked for might, indeed, uphold plaintiff's contention as to the powers of the Interstate Commerce Commission, but might be perilously near the unreasonable search forbidden by the Constitution. If the plaintiff had propounded claims to relief in such separately stated propositions as were based upon a general but exact description of the class of records which had been demanded, but which the examiner had failed to obtain, we might then be able to discriminate and grant such parts of the relief sought as appeared to be proper, while denying the rest. But where the plaintiff asks an unlimited roving commission for the examiners, without making such specific averments as will enable the court to discriminate in its judgment between what may be properly granted and what not, we think no title to any relief is made clear by the plaintiff, who must adequately and sufficiently show its claim to be well founded, at least in part. Here, such confusion exists between what might be good and what bad that the court does not think it discreet
41 to grant the writ prayed for as the case is now presented.

Upon reasons such as we have indicated, while the action must be dismissed, it should be without prejudice, and the judgment will so provide. One may be prepared accordingly.

WALTER EVANS, *Judge.*

MARCH 25, 1914.

42 And on another day of said term, to wit, on the 18th day of April, 1914, the following proceedings were had:

No. 164.

In the District Court of the United States for the Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, the Attorney General of the United States, plaintiff.
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, defendant.

This day appeared The United States of America, plaintiff, by George DuRelle, attorney of the United States, and Joseph W.

Folk, chief counsel for the Interstate Commerce Commission, and tendered to the court a bill of exceptions, which having been approved and signed by the court is now ordered filed. Plaintiff tendered its assignment of errors, which is now ordered filed, and also a petition for a writ of error and a petition for an appeal, which are hereby filed, and it is ordered that said petition for appeal and said writ of error be, and the same are hereby, allowed to be reviewed in the Supreme Court of the United States.

43 The bill of exceptions above referred to is as follows:

No. 164.

In the District Court of the United States for the Sixth Circuit and Western District of Kentucky.

UNITED STATES OF AMERICA, BY JAMES C. McReynolds, Attorney General, plaintiff.
vs.
LOUISVILLE AND NASHVILLE RAILROAD Company, defendant.

Bill of exceptions.

Be it remembered that on the 23rd day of March, 1914, the above-entitled cause came on for trial before the above-styled court, the honorable Walter Evans, district judge, presiding.

The plaintiff appeared by George DuRelle, United States Attorney, and P. J. Farrell, solicitor of the Interstate Commerce Comsion, and the defendant by Henry L. Stone, Helm Bruce, and E. S. Jouett, its counsel, and the following proceedings were had:

WILL H. CARLETON, called as a witness for the plaintiff, being duly sworn and examined by George DuRelle, testified as follows:

Q. What is your name?

A. Will H. Carleton.

Q. What is your occupation?

A. Examiner for the Interstate Commerce Commission.

Q. How long have you been so occupied?

A. Since May 10th, 1909.

Q. What is the exact title of your office?

44 A. The exact title is Special Agent or Examiner.

Q. Of the Interstate Commerce Commission?

A. Of the Interstate Commerce Commission.

Q. What is your authority as such special agent or examiner?

The COURT. Is that fixed by statute or by instructions from the Interstate Commerce Commission?

Judge DURELLE. A little of both.

Mr. BRUCE. So far as fixed by the Interstate Commerce Commission, I object to the witness stating it. He must produce the record.

The COURT. Yes; I take it it is largely dependent upon the statute, and upon that no proof is necessary.

Judge DuRelle. No; no proof is necessary, and the instructions of the commission can not go further than the statutes, but I wanted to show that they went that far.

The Court. Suppose we assume that they did go that far.

Judge DuRelle. I would like in this case for the witness to produce the exact authority from the commission that he has.

The Court. I rather think that the point is well taken so far. I think he should produce the authority. I think you may fairly assume that the Interstate Commerce Commission had given to one of its general agents the right to exercise all of the authority the law conferred upon him. If, however, there were any special instructions apart from that, the other side should have them. I think we should have a copy of what special instructions were given, but I don't think the appointment of this special agent would carry with it the authority to do anything that the statute authorized, and the only question is the details or how he attempted to carry out that authority.

Judge DuRelle. Very well, I will produce and have read in evidence the authorization. We have the original authorization of this witness.

45 The Court. Just read that.

Q. Read that in evidence.

Mr. Bruce. I would like to see it first.

The paper in question was handed to the counsel for the defendant, who examined it and handed it back to the witness, who then read.

A. United States of America, Interstate Commerce Commission, Washington. I, Edward E. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that, under the authority conferred by law, the Interstate Commerce Commission has duly appointed Will H. Carleton a special agent or examiner, with authority to inspect and examine any and all accounts, records, and memoranda kept by carriers subject to the act to regulate commerce, and his authority will be respected accordingly.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said commission at its office in Washington, District of Columbia, this 10th day of May, 1909.

(Signed) Edward E. Moseley,
Sec'y Interstate Commerce Commission.

Certificate No. 49, and with the seal of the commission thereon.

Q. Has that authority ever been revoked?

A. It has not.

Q. Under that authority did you, as special agent or examiner of the commission, make, or attempt to make, an examination of the accounts, records, and memoranda of the Louisville & Nashville Railroad Company in this city?

A. I did.

Q. Did you have any other authority from that commission than that?

A. No, sir.

Q. Were you or not refused access to any accounts, records,
46 or memoranda of the Louisville & Nashville Railroad Company?

A. Yes, sir.

Q. On what dates?

A. Various.

The COURT. Give them, approximately.

Q. Was such refusal——

The COURT. I have not heard him give the dates. I want him to give the dates as near as he can.

A. Approximately. January 23d was the date of the first refusal.

Q. Were you refused access to any such accounts, records, or memoranda on February 4th?

A. Yes, sir.

Q. Were you refused access to any specific records for which you asked?

The COURT. That is a very important question, as the case will probably bring out as to what records, accounts, or memoranda he was refused access to. I think we must get down to specific facts, in order that the court may understand and differentiate certain things that will be spoken of further along.

Q. Before we come to that I will ask another question: Was the refusal of the Louisville & Nashville Railroad Company put in writing?

A. It was.

Q. Have you that written refusal?

A. I have.

Q. Will you please produce it?

(The witness did so.)

Q. By whom was that refusal made?

A. W. L. Mapother, the first vice president of the Louisville & Nashville Railroad Company.

47 Q. To whom was that addressed?

A. To me.

Judge DuRELLE. I offer that in evidence.

The COURT. Read that in full. I want to hear it.

A. Do you care for the heading?

The COURT. All of it.

WITNESS. The printed head?

The COURT. Just read it.

A. LOUISVILLE & NASHVILLE RAILROAD COMPANY,
FIRST VICE PRESIDENT'S OFFICE, LOUISVILLE, KY.,
W. L. MAPOTHER, FIRST VICE PRESIDENT,
February 4, 1914.

Mr. WILL H. CARLETON,
Examiner Interstate Commerce Commission,
Hermitage Hotel, City.

DEAR SIR: In view of our several discussions concerning the extent of the powers of yourself and assistants in the matter of examining

the correspondence files and papers of the L. & N. R. R. Co., I deem it desirable that I clearly and definitely state the company's position, in order that you may govern yourself accordingly.

It is the opinion of our general counsel, (1) that the extraordinary inquisitorial powers given to the commission, its agents, and examiners, by section 20 of the act to regulate commerce, relate only to such "accounts, records, and memoranda" as the commission is empowered by that section to prescribe, and (2) that said section, as amended by what is commonly known as the Hepburn Act, approved June 29, 1906, effective August 28, 1906, is not retroactive, but prospective only, and relates exclusively to the particular "accounts, records, and memoranda" which have been kept in pursuance of said act, and, hence, necessarily such as came into existence on and after the effective date of said act.

48 Entertaining these views, we consider that you have no authority at all to examine the correspondence files of the executive department as you have been permitted to do for some weeks; and no right to examine the "accounts, records, and memoranda" referred to in said section, except those which have been kept on and after August 28, 1906.

We are willing, however, in order to facilitate your work, to allow you to continue your examination of the executive department's correspondence files, as well as any "accounts, records, or memoranda" kept by and still in possession of the company, originating on and after the date last mentioned. This permission, it is to be understood, is not to embrace any communication between the representatives of this company and its counsel of a privileged nature, as between client and attorney.

Yours, truly,

(Signed) W. L. MAPOTHER,
First Vice President.

The COURT. Now, so far as the company expressed a willingness to have its accounts, etc., examined, is there any claim that they refused leave to do that; did they refuse afterwards to carry that willingness into effect?

Judge DURELLE. Yes.

The COURT. Of course, there may be a dispute on certain points that I am not inquiring about, but I am trying to limit the inquiry for the present to those things about which there have been disputes, and I want to know whether there was any claim by the Interstate Commerce Commission or the United States that the railroad company had refused, after this letter was written, to do what they expressed a willingness in that letter to do.

Judge DURELLE. They did.

The COURT. Let us go to that and see if they did that.

49 Judge DURELLE. I wanted to put in the other correspondence first.

Q. Were any other letters addressed to you by Mr. Mapother as first vice president of the defendant company explanatory of this letter?

A. Yes, sir.
Q. Will you produce them?
(The witness does so.)
Q. Read this, if you please.
A. LOUISVILLE & NASHVILLE RAILROAD COMPANY,
FIRST VICE PRESIDENT'S OFFICE, LOUISVILLE, KY.,
W. L. MAPOTHER, FIRST VICE PRESIDENT,
February 11, 1914.

Mr. WILL H. CARLETON,
Examiner Interstate Commerce Commission,
Hermitage Hotel, City.

DEAR SIR: Please refer to my letter of the 4th instant, outlining the views and policy of this company relative to your continued investigation of its affairs.

Your right to examine correspondence at all was denied, but, as a matter of grace, we expressed a willingness for you to continue your examination of the correspondence of the executive department on and after August 28, 1906. In view, however, of the fact that the matter has now been taken into the courts, where each side to the controversy will stand upon its legal rights, this permission is withdrawn and you are hereby notified that we will not allow you to examine this correspondence any further, except so much thereof as relates to the issuing of passes on and after January 1, 1911.

Yours, truly,

(Signed) W. L. MAPOTHER,
First Vice President.

50 (The paper referred to was put in evidence as Exhibit marked B.)

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
FIRST VICE PRESIDENT'S OFFICE, LOUISVILLE, KENTUCKY,
W. L. MAPOTHER, FIRST VICE PRESIDENT,
February 12, 1914.

Mr. WILL H. CARLETON,
Examiner Interstate Commerce Commission,
L. & N. Office Building, City.

DEAR SIR: Referring to our conversation this morning, during which you inquired for information as to the destruction of papers.

As you are aware, the statute contemplates and permits such destruction, and the Interstate Commerce Commission has prescribed regulations whereby carriers' papers, after a lapse of certain periods, may be destroyed. The law and regulations in this respect have at all times been complied with by this company.

As we have heretofore advised, we deny that in the pending investigation you have the right of access to papers antedating August 28, 1906. Consistent with this position, we must refuse you access to certificates, if any, of destruction relating to papers prior to that date, but we hereby furnish you all certificates of destruction relating to papers subsequent to such dates, including those certificates which

lap over and refer to papers both since that date and prior thereto. They consist of 213 packages bound in the secretary's contract covers, most of which contain numerous certificates; also six unbound certifications.

Yours, truly,

(Signed) W. L. MAPOTHER,
First Vice President.

51 (This was filed in evidence as Exhibit C.)

The COURT. Give me the date when you think the Hepburn law went into effect.

Mr. BRUCE. August 28th, 1906.

The COURT. All right.

By Judge DURELLE: Was any order made by the commission—I would like to get this right, if your honor please—prescribing the time after which correspondence might be destroyed.

A. Yes, sir.

Q. Have you the order of the commission in regard to that with you?

A. Yes, sir.

Q. Read that paragraph fixing that time.

The COURT: And give the date of the order.

Q. Give the date of the order and read that paragraph.

A. There are two orders, one dated June 10th, 1910. Under Item 64 it reads:

"Correspondence and records thereof relating to subjects listed in items one to sixty-three, inclusive." Under the column of "Period to be retained" it says "For the period prescribed for each item."

Q. Read what it says in the other order and give the date.

A. June 8th, 1911, which amends and supplements the prior order: "Under Item 64 correspondence and records thereof relating to subjects listed in items one to seventy-two, inclusive, for the period prescribed for each item."

By the COURT: What was the longest of those periods prescribed?

A. Permanent.

The COURT. Some were not to be destroyed at all?

Judge DURELLE. That is right.

52 Q. Were you or not refused access to any of the accounts, records, and memoranda made subsequent to August 28th, 1906?

A. Yes, sir.

The COURT. That is an immaterial question, unless you tell us what they were as near as you can in general terms. Go ahead. I am speaking to counsel. You should call that out.

Q. State the specific instance in which a record made subsequent to that date was refused you.

A. Certificates covering the destruction of records which were destroyed subsequent to August 28th, 1906.

Q. Those records were made subsequent to that date?

A. Yes, sir.

Q. What was your occupation before your appointment as a special agent and examiner of the Interstate Commerce Commission?

A. Immediately prior I was chief clerk of general accounts in the accounting department of the Minneapolis, St. Louis and Iowa Central Railway Company.

Q. How long were you in that position?

A. Five years, approximately.

Q. Prior to that did you have any experience in railroad offices?

A. About nine years, I would say, in railroad offices.

Q. In what departments?

A. In the accounting department.

Q. From your experience, can you state whether, in railroad transactions, there are many cases in which the details can not be ascertained without reference to the correspondence in relation thereto?

A. Yes, sir.

Mr. BRUCE. We object to that question.

The COURT. That is a hypothetical question.

Judge DURELLE. I am asking for the information.

53 The COURT. I think it is immaterial. The law does not depend on whether he can or can not do certain things.

Judge DURELLE. I think that is true, but I want to show by this witness, if your honor will permit it, that he knows the custom or railroads in that behalf.

The COURT. Does he know the custom of the Louisville & Nashville Railroad Company?

Judge DURELLE. I am speaking of railroads in general.

The COURT. That is too remote and opens up too wide an inquiry. Ask him if he knows the custom of this railroad in that regard.

Q. Do you know from your experience whether, in the transactions of the Louisville & Nashville Railroad Company, there are many cases in which the details of the transaction can not be ascertained without reference to the correspondence in relation to the transaction?

Mr. BRUCE. We object to that.

The COURT. We may assume all such things are very desirable. We know perfectly well you can not understand general statements without going into details, but that is not quite what we want to ascertain in this case. If you limit the answer to yes and no, all right.

(The question was read to the witness.)

A. Yes.

The COURT. That is all. I did not mean to say that you can go into the matter anything like in detail.

Judge DURELLE. We did not wish to.

The COURT. He can answer that question.

Q. State whether there are many such cases in the business of the Louisville & Nashville Railroad Company.

Mr. BRUCE. We object to that.

The COURT. I think we are going into an abstract investigation and I think it is well to stop right here.

Judge DURELLE. Does your honor sustain the objection?

The COURT. I do.

54 Judge DURELLE. I shall ask an exception.

The COURT. All right.

Judge DURELLE. You can ask the witness, Mr. Bruce.

Cross-examined by Mr. BRUCE:

You have said you were denied access to certain certificates of destruction of records. Were not the records covered by those certificates of destruction made prior to August 28, 1906?

A. Not having seen the certificates covering the destruction, I am unable to state.

Q. Then, you are not able to say that you were denied access to any certificates of destruction of records where the records were created on or subsequent to August 28th, 1906?

The COURT. Just state your knowledge on that subject. He asked you if you were able to state one way or the other on that question.

A. No.

Mr. BRUCE. That is all.

(Thereupon the plaintiff rested.)

The defendant thereupon offered in evidence the following documentary evidence:

1. A certified copy of an order of the Interstate Commerce Commission made November 10, 1913, which paper is as follows:

55 ORDER.

At a General Session of the Interstate Commerce Commission, held in its office in Washington, D. C., on the 10th day of November, A. D. 1913.

EDGAR E. CLARK,
JUDSON C. CLEMENTS,
JAMES S. HARLAN,
CHARLES A. PROUTY,
CHARLES C. MCCHORD,
BALTHASAR H. MEYER,
JOHN H. MARBLE,
} Commissioners.

No. 6319.

In re financial relations, rates, and practices of the Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway; and other carriers.

The United States Senate having, by Resolution No. 153, adopted November 6, 1913, directed the Interstate Commerce Commission

to investigate, take proof, and report to the Senate as soon as practicable—

First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;

Second. What other railroads in the territory served by the Louisville & Nashvlile Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga and Saint Louis Railway;

56 Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory, in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

Fourth. Any other fact or facts showing, or tending to show, the further relations between the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad or any of its subsidiaries or holding companies;

Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory, in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

Seventh. Any other facts or fact showing or tending to show the further relations between the Louisville & Nashville Railroad, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or facts showing or tending to show whether these relations restrict competition and maintain and fix rates;

Eighth. Any fact or facts showing or tending to show (a) the relations between the Louisville and Nashville Railroad; the Nashville, Chattanooga and Saint Louis Railway; the Tennessee

57 Midland Railroad; the Tennessee, Paducah and Alabama Railroad; and any other railroad that have been purchased or leased by either or both of said railroads companies, and whether such relations restrict competition and maintain and fix rates; and (b) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia and the arrangement made between the Louisville & Nashville and the Nashville, Chattanooga and Saint Louis Railway by

which the former uses the tracks of the said Western and Atlantic restrict competition, restrain trade, and determine and fix rates;

Ninth. Any fact or facts showing or tending to show whether the ownership of the Louisville & Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway of any railroad terminals or terminal companies, steamboats and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dockyards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly, and restricts competition, and determines and fixes rates;

Tenth. Any fact or facts showing or tending to show whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

Eleventh. What amount of stock, if any, the Atlantic Coast Line Company, or Atlantic Coast Holding Company, owns in the Louisville & Nashville Railroad and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tend to restrict competition and maintain and fix rates;

58 Twelfth. What amount, if any, the Louisville and Nashville Railroad; the Nashville, Chattanooga and Saint Louis Railway; the Nashville and Decatur Railroad; and the Lewisburg and Northern Railroad, all or any of them, have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

Thirteenth. (a) The number of free annual passes; (b) the number of free-trip passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials or at the request of members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads;

It is ordered, that a proceeding of inquiry and investigation be, and the same is hereby, instituted into and concerning the several matters and things set forth and referred to in the said resolution.

It is further ordered, that this proceeding be set for hearing at such times and places, and that such persons be required to appear and testify or to produce books, documents, and papers as the commission may hereafter direct; and that the investigation be carried

on in the meantime by such other means and methods as may be deemed appropriate.

And it is further ordered, that a copy of this order be served upon each of the following-named railroad companies and upon any other companies which may hereafter be designated by the commission:

59 Nashville, Chattanooga & St. Louis Railway;
Louisville & Nashville Railroad Company;
Nashville & Decatur Railroad Company;
Lewisburg & Northern Railroad;
Tennessee Midland Railroad Company;
Tennessee, Paducah & Alabama Railroad;
Western & Atlantic Railroad; and
Atlantic Line Railroad Company.

By the Commission:

(Signed) GEORGE B. MCGINTY,
Secretary.

The certificate was as follows:

INTERSTATE COMMERCE COMMISSION, WASHINGTON.

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the paper herewith attached is a true copy of order of the commission entered November 10, 1913, in the proceedings entitled "In re financial relations, rates, and practices of the Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway, and other carriers," docket No. 6319, the original of which is now on file and of record in the office of this commission. Copy of said order was served upon Mr. J. A. Ridgely, Washington representative of the Louisville & Nashville Railroad Company, on November 13, 1913, the receipt for which is now on file and of record in the office of this commission.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the commission on this 16th day of March, 1914.

(Signed) GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

60 It was conceded by counsel for the plaintiff that the Interstate Commerce Commission had prescribed forms for keeping the accounts, as set forth in the answer.

Said testimony was all the testimony introduced on behalf of the plaintiff or defendant in said cause.

The court, having examined the foregoing bill of exceptions, approves and signs the same and makes it a part of the record.

This 18th day of April, A. D. 1914.

WALTER EVANS,
District Judge.

61 The assignment of errors above referred to is as follows:

No. 164.

In the District Court of the United States for the Sixth District and Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, Attorney General of the United States,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Assignments of errors.

That afterwards, to wit, on the eighteenth day of April, A. D., 1914, comes the United States of America, plaintiff in error, by George DuRelle, attorney of the United States, and Jos. W. Folk, chief counsel for the Interstate Commerce Commission, and says that in the record of the proceedings in the above-entitled cause in the United States District Court for the Sixth Circuit and Western District of Kentucky, there is manifest error in this, to wit:

I. In denying to plaintiff the writ of mandamus prayed for in the petition herein.

II. In adjudging that the petition of the plaintiff be dismissed without prejudice.

III. In considering the affirmative averments of the answer which are controverted by force of the act to regulate commerce and in support of which no evidence was introduced.

IV. In holding that communications between the attorney of a railroad company engaged in interstate commerce and other officers of such company are privileged as against the Government.

62 V. In holding that communications between officers of a railroad company engaged in interstate commerce are privileged and can not be examined by the Interstate Commerce Commission under the law.

VI. In holding that the correspondence of a railroad engaged in interstate commerce is not a part of the accounts, records, and memoranda of such railroad.

VII. In holding that a railroad engaged in interstate commerce is entitled to have any secrets as against its creator, the Government.

VIII. In holding that correspondence desired to be examined must be specified and its contents stated; as it is manifestly impossible to know what is contained in the correspondence until it is examined and the purpose of the examination must be to ascertain if the correspondence contains any matter germane to the investigation by the commission.

IX. In holding that a railroad engaged in interstate commerce may judge for itself what part of its correspondence it will permit the Interstate Commerce Commission to examine.

X. In holding that the provisions of section 20 of the act to regulate commerce as amended did not apply to accounts, records, and memoranda made previous to August 28, 1906.

GEORGE DURELLE,
United States Attorney, Western District of Kentucky.
JOSEPH W. FOLK,
Chief Counsel for the Interstate Commerce Commission.
Attorneys for the United States.

63 The petition for a writ of error, above referred to, is as follows:

No. 164.

In the District Court of the United States for the Sixth Circuit and Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, Attorney General of the United States,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Petition for writ of error.

Now comes the United States of America, plaintiff herein, by George DuRelle, attorney of the United States, and Jos. W. Folk, chief counsel for the Interstate Commerce Commission, and says that on the 25th day of March, A. D. 1914, this court entered judgment herein in favor of said defendant against said plaintiff, and rendered a decision and judgment denying the plaintiff's motion and application for a writ of mandamus against said defendant, and adjudging that the plaintiff's petition be dismissed without prejudice, in which decision and judgment and proceedings certain errors were committed to the prejudice of the United States, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the said United States prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly
64 authenticated, may be sent to said Supreme Court of the United States.

GEORGE DURELLE,
United States Attorney, Western District of Kentucky.
JOSEPH W. FOLK,
Chief Counsel for the Interstate Commerce Commission.
Attorneys for Plaintiff in Error.

65 The petition for appeal above referred to is as follows:

No. 164.

In the District Court of the United States for the Sixth Circuit and Western District of Kentucky.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, Attorney General of the United States,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Petition for appeal.

Now comes the United States of America, plaintiff herein, by George DuRelle, attorney of the United States, and Jos. W. Folk, chief counsel for the Interstate Commerce Commission, and say that on the 25th day of March, A. D. 1914, this court entered judgment herein in favor of said defendant against said plaintiff, and rendered a decision and judgment denying the plaintiff's motion and application for a writ of mandamus against said defendant, and adjudging that the plaintiff's petition be dismissed without prejudice, in which decision and judgment and proceedings certain errors were committed to the prejudice of the United States, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the said United States does hereby appeal from said decision and judgment of March 25, 1914, to the honorable the Supreme Court of the United States for the correction of the errors so complained of, and prays that its appeal may be allowed, and that a transcript of the record, proceedings, and papers in
66 this case, duly authenticated, may be sent to said Supreme Court of the United States.

GEORGE DURELLE,
United States Attorney, Western District of Kentucky,
JOS. W. FOLK,
Chief Counsel for the Interstate Commerce Commission,
Attorneys for Appellant.

67 Praecipe filed May 2, 1914.

No. 164.

United States District Court, Western District of Kentucky.

UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, Attorney General of the United States, plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, defendant.

Praecipe.

The clerk will copy—

1. Petition.
2. Answer.
3. Motion entered March 19, 1914, for writ of mandamus.
4. Order submitting said motion.
5. Opinion of the court.
6. Order overruling the motion for mandamus and dismissing the petition.
7. Assignment of errors.
8. Petition for an appeal.
9. Order granting an appeal.
10. Petition for a writ of error.
11. Order granting the writ of error.
12. Bill of exceptions.
13. And this praecipe.

JOSEPH W. FOLK,
GEORGE DURELLE,
Counsel for Appellant and Plaintiff in Error.

Service of a copy of this praecipe is hereby acknowledged this May 1st, 1914.

HELM BRUCE,
Attorney for Appellee and Defendant in Error.

68 UNITED STATES OF AMERICA,
District of Kentucky, Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Western District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between The United States of America, by James C. McReynolds, Attorney General of the United States, plaintiff, and Louisville and Nashville Railroad Company, defendant, a manifest error hath happened, to the great damage of the said The United States of America, by James C. McReynolds, Attorney General of

the United States, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in said circuit, on the 1st day of June next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States of America the one hundred and thirty-eighth.

A. G. RONALD,
Clerk of the District Court of the United States,
Western District of Kentucky.

Allowed by WALTER EVANS, *Judge.*

69 UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, ss:

To Louisville and Nashville Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, in said circuit, on the 1st day of June next, pursuant to an appeal and a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Kentucky, wherein The United States of America, by James C. McReynolds, Attorney General of the United States, is appellant and plaintiff in error, and you are appellee and defendant in error, to show cause, if any there be, why the judgment rendered against the said appellant and plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this sixth day of May, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States of America the one hundred and thirty-eighth.

WALTER EVANS, *Judge.*

Service of a copy of the foregoing citation is hereby acknowledged this May 7th, 1914.

HELM BRUCE,
Attorney for Appellee and Defendant in Error.

70 *Certificate of clerk.*

I, A. G. Ronald, clerk of the District Court of the United States for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing 69 pages contain a true and correct transcript of the record and proceedings in the case of the United States of America by James C. McReynolds, Attorney General of the United States, plaintiff, against the Louisville and Nashville Railroad Company, defendant, No. 164, copied herein in accordance with the praecipe filed and found on page 67 of this transcript, as the same appears from the files and records of my said office.

Witness my hand and the seal of said court this 12th day of May, A. D. 1914.

[SEAL.] A. G. RONALD,
Clerk of the District Court of the United States for the Western District of Kentucky.

(Indorsement on cover:) File No. 24238. Kentucky D. C. U. S. Term No. 499. The United States of America, by James C. McReynolds, Attorney General of the United States, plaintiff in error and appellant, *vs.* Louisville & Nashville Railroad Company. Filed May 25th, 1914. File No. 24238.

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2. Information of the relations existing between carriers is indispensable and necessary for the performance by the Commission of its proper duties	14
(*a*) The preservation of competition is one of the purposes of the act, and its existence or non-existence bears directly upon the questions of discrimination, reasonableness of rates, and similar matters	15
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ARGUMENT—Continued.

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The question is also important in ascertaining whether charges fixed by a carrier are just and reasonable within section 1 of the act ---------- 16

Interstate Commerce Commission v. Chicago, Great Western Ry. Co., 209 U. S. 108, 119; and cases cited.

The matter of competition is also to be considered in applying the provisions of sections 3 and 4 of the act with reference to undue or unreasonable preference to persons, etc., and the long and short haul clause ---------- 17

Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 164.

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Central Yellow Pine Ass'n v. *Illinois Central R. R. Co.*, 10 I. C. C. 505.

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(*b*) Whether a carrier is subject to the act at all frequently depends upon the relation between it and other carriers ---------- 20

Cincinnati etc. Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 184.

(*c*) The inquiry of the Commission is proper as a basis for legislative recommendations, for legal prosecutions, and for many other purposes ---------- 21

Interstate Commerce Commission v. *Brimson*, 154 U. S. 447, 474.

Interstate Commerce Commission v. *Goodrich Transit Co.*, 224 U. S. 194, 208.

ARGUMENT—Continued.

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The inquisitorial work of the Commission has been the basis of practically all congressional legislation affecting interstate carriers during the past 25 years 25

3. Where the persons and subjects under consideration are within the field of the Commission's lawful activities, the courts will not inquire as to the ultimate object of the investigation 25

The plenary power of the Commission has been repeatedly recognized and upheld 25

Interstate Commerce Commission v. *Brimson*, *supra*.

Interstate Commerce Commission v. *Goodrich Transit Co.*, *supra*.

Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 438.

Even if the investigation should divulge violations of the Anti-trust Act rather than of the Act to Regulate Commerce, that would not end the Commission's power 27

Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93.

II. In the course of this investigation the Commission was entitled to inspect the "accounts, records, and memoranda," including the correspondence, of the defendant in error 28–37

1. The correspondence is not exempt from inspection merely because it is not of that class of accounts, records, and memoranda whose form the Commission has undertaken to prescribe 29

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, ATTORNEY GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR, APPELLANT,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

No. 499.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to the District Court of the United States for the Western District of Kentucky (212 Fed. 486), which refused a writ of mandamus sought by the United States under the provisions of section 20 of the Act to Regulate Commerce, as amended, 34 Stat. 584, 594, 595, ch. 3591.

The relief sought by the writ was to compel the defendant in error Louisville & Nashville Railroad

Company, a carrier engaged in interstate commerce, to comply with the provisions of the Act to Regulate Commerce by permitting the Interstate Commerce Commission, in the exercise of the authority conferred upon it, to have access by its authorized and duly appointed special agents and examiners to all of the accounts, records, and memoranda of the defendant company.

The Commission was engaged at the time in a "proceeding of inquiry and investigation" into certain matters and things set forth in Senate Resolution No. 153, adopted November 6, 1913, which is as follows (R. 18–19):

> *Resolved,* That the Interstate Commerce Commission be, and the same is hereby, directed to investigate, taking proof and employing counsel, if necessary, and report to the Senate as soon as practicable—
>
> First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;
>
> Second. What other railroad or railroads in the territory served by the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with, for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga and Saint Louis Railway;

Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

Fourth. Any other fact or facts showing or tending to show the further relations between the Louisville and Nashville Railroad and Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad, and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad, or any of its subsidiaries, or holding companies;

Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

Seventh. Any other fact or facts showing, or tending to show, the further relations between the Louisville and Nashville, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or

facts showing, or tending to show, whether these relations restrict competition and maintain and fix rates;

Eighth. Any fact or facts showing, or tending to show, (a) the relations between the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah and Alabama Railroad, and any other railroads that have been purchased or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and (b) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia, and the arrangement made between the Louisville and Nashville and the Nashville, Chattanooga and Saint Louis Railroad by which the former uses the tracks of the said Western and Atlantic Railway restrict competition, restrain trade, and determine and fix rates;

Ninth. Any fact or facts showing, or tending to show, whether the ownership of the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway of any railroad terminals or terminal companies, steamboats and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dock yards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly and restricts competition and determines and fixes rates;

Tenth. Any fact or facts showing, or tending to show, whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

Eleventh. What amount of stock, if any, the Atlantic Coast Line, or Atlantic Coast Holding Company owns in the Louisville and Nashville Railroad, and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates;

Twelfth. What amount, if any, the Louisville and Nashville Railroad; the Nashville, Chattanooga and Saint Louis Railway; The Nashville and Decatur Railroad; and the Lewisburg and Northern Railroad, all or any of them, have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

Thirteenth. (a) The number of free annual passes; (b) the number of free-trip

passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads.

The proceeding of inquiry and investigation was instituted by the Commission on November 10, 1913 (R. 10, 13), and special agents and examiners duly appointed by the Commission were authorized to inspect and examine the accounts, records, and memoranda of the defendant in error (R. 5, 27).

On February 4, 1914, the Commission by one of these agents, Will H. Carleton, made demand upon the defendant in error for access to its accounts, records, and memoranda, including correspondence received and copies of correspondence sent by the defendant in error, both prior and subsequent to August 28, 1906, and the indexes pertaining thereto. This demand was refused, and access was denied except as to that portion of the accounts, records, and memoranda of the defendant in error the form of which had been prescribed by the Interstate Commerce Commission and which had been kept on and after August 28, 1906, and as to any corre-

spondence on and after January 1, 1911, which related to the issue of passes. There was thus withdrawn from the inspection of the Commission (1) all accounts, records, and memoranda kept prior to the 28th of August, 1906, (2) all accounts, records, and memoranda subsequent to that date the form of which had not been specifically prescribed by the Commission, (3) all correspondence (and the indexes thereto) upon any subject (other than the issue of passes subsequent to January 1, 1911), and (4) all certificates of destruction, if any, relating to papers antedating August 28, 1906.

This proceeding was thereupon instituted at the request of the Commission. To the petition praying mandamus the defendant in error answered, averring, in substance, (*a*) that the correspondence sought was private and confidential and (*b*) consisted in part of privileged communications between the defendant in error and its attorneys at law; (*c*) that no portion of its correspondence constituted "accounts, records and memoranda" within the meaning of the act; (*d*) that to interpret the act as allowing the Commission access to any and all accounts, records, and memoranda, and all correspondence, would subject the defendant in error to an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution; and (*e*) that, save as to the question of the issuance of free passes, no part of the subject-matter contained in the first 12 paragraphs of the Senate

Resolution lay within the power or jurisdiction of the Interstate Commerce Commission or within the scope or purposes of the Act to Regulate Commerce.

It was further contended as matter of law, although not specifically urged in the answer, that the right of inspection did not extend to any records whatsoever kept prior to August 28, 1906, the date when the Hepburn Act took effect.

The case was submitted upon the petition, answer, and the testimony of the examiner, Carleton. The court refused the writ and dismissed the petition, without prejudice, upon the grounds, as stated in its written opinion (R. 16; 212 Fed. 486), (1) that the matters set forth in the Senate Resolution did not relate to interstate commerce as regulated by the Interstate Commerce Act; (2) that the correspondence between the defendant in error and its counsel was privileged; and (3) that since the petition did not state the exact records or papers the examination of which was demanded it was inadequate as a basis for the writ. The court found it unnecessary to decide upon the contentions of the defendant in error with reference to accounts, records, and memoranda kept prior to August 28, 1906, and to the invasion of the constitutional guaranty against unreasonable search and seizure, indicating, however, that it leaned towards the position of the defendant in error in both respects.

SPECIFICATIONS OF ERROR.

The assignments of error raise broadly the right of the plaintiff in error to the relief prayed for and denied. The questions involved sufficiently appear from what has been said above as to the reasons assigned by the court for its action and the defenses asserted on the part of the railroad company.

ARGUMENT.

I.

The scope and purpose of the pending investigation is within the purview of the Act to Regulate Commerce and within the power and jurisdiction of the Interstate Commerce Commission.

1. The power of the Commission in the premises is drawn from the Act to Regulate Commerce, and the Senate Resolution simply serves to define the subjects to which the attention of the Commission is directed.

It should be understood at the outset that the Government does not rely upon Senate Resolution No. 153, *supra*, as the source of the Commission's authority to prosecute this investigation. It may be conceded that the power conferred upon the Commission can be increased or diminished only by act of Congress or joint resolution of the two Houses having the effect of law, and that a resolution adopted by one branch can add nothing to the authority theretofore given. What that authority is in the present instance may be ascertained by

reference to the following sections of the Act to Regulate Commerce, as amended:

> SEC. 12. That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; * * * and for the purposes of this Act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses, the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. (26 Stat. 743.)
>
> SEC. 13. * * * and the Interstate Commerce Commission shall have full authority and power at any time to institute and inquire, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before said Commission by any provision of this Act or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act.

And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. (36 Stat. 539, 551.)

SEC. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information.

* * * * *

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, and memoranda

> than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. (34 Stat. 584, 593, 594.)

The Commission therefore had the power to institute this investigation on its *own* motion and was necessarily the judge as to what information and what representations should be deemed sufficient to cause it to investigate. It had a clear right to give heed to the resolution of the Senate and to comply with it so far as its powers permitted. Having been stirred to action, it was not even bound to restrict its inquiry to the limits fixed by the resolution, although it appears that it elected to do so.

The resolution is material, therefore, only as it defines the scope and field of the investigation. It contains, as above set forth, 13 paragraphs. The thirteenth paragraph, which seeks for information relating to free passes issued by the defendant in error and other carriers since January 1, 1911, may be ignored at present for the reason that the defendant in error does not contest the right of the Commission to investigate that subject, and has supplied the Commission with satisfactory information thereon.

The remaining 12 paragraphs suggest the following topics for investigation:

First. The relations existing, whether by direct purchase, by ownership of stocks or bonds, by lease, by contract, or otherwise, between the Louisville & Nashville Railroad Company and certain other railroad companies engaged in interstate commerce. (See paragraphs 1, 2, 4, 5, 6, 7, 8, and 11.)

Second. The effect of these relationships upon competition and the fixing of rates. (See paragraphs 3, 4, 6, 7, 8, 10, and 11.)

Third. The ownership by the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway Company of railroad terminals or terminal companies, steamboats or steamboat lines, docks or dockyards, and the effect of such ownership in establishing monopoly, restricting competition, or determining and fixing rates. (See paragraph 9.)

Fourth. The expenditure of moneys by the Louisville & Nashville Railroad Company and others in stifling competition, maintaining political or legislative agents, contributing to political campaigns, or creating public sentiment. (See paragraph 12.)

All these things the defendant in error contends, and the court below held, have no relation to interstate commerce as regulated by the act; and the court therefore felt itself without power to aid the Commission in procuring information with reference to the same.

2. Information of the relations existing between carriers is indispensable and necessary for the performance by the Commission of its proper duties.

The act expressly requires that the Commission shall keep itself informed as to the manner and method in which the business of all common carriers is conducted, and "shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created." These duties and objects are in the main to execute and enforce the provisions of the Act to Regulate Commerce as well as sundry other statutes which the Commission has been given power to administer, such as the Safety Appliance Acts of 1893 and 1903, Arbitration Act of 1898, Accident Reports Act of 1901, Medal of Honor Act of 1905, and Hours of Service Act of 1907. In addition to these administrative duties the Commission is required by section 21 of the act to make an annual report to Congress of such information and data collected by it "as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary"; and thus its inquiry may extend over the still wider domain of legislation. Can it be contended that the intercorporate relations of common carriers are for it a forbidden field? The answer would seem to be easy.

(a) The preservation of competition is one of the purposes of the Act, and its existence or non-existence bears directly upon the questions of discrimination, reasonableness of rates, and similar matters.

"The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights." *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 276.

It was not designed to prevent competition between different roads, but, on the contrary, if a reasonably free competition between carriers subject to the act is preserved that alone will go far to accomplish its purposes; hence it is that the preserving of competition is itself one of the objects of the act. Said Commissioner Veazey in *Gerke Brewing Co.* v. *Louisville & Nashville R. R. Co.*, 5 I. C. C. 596, 606:

> To preserve legitimate competition between public carriers, that is, competition which is not contrary to the public interest, and to prevent that competition which is illegitimate, or in other words opposed to the public welfare, is precisely that which,

among other things, the law undertakes to accomplish.

See also *In the Matter of Export and Domestic Rates*, 8 I. C. C. 214, 260.

Even if it be contended that the preservation of competition is not of itself one of the primary purposes of the act, the question is none the less important in many respects; and in none more so than in ascertaining whether charges fixed by a carrier are just and reasonable within section 1 of the act. Thus it has been held that in fixing their own rates railroad companies may take into account the competition with other carriers provided only that competition is genuine and not a pretense. *Interstate Commerce Commission* v. *Chicago, Great Western Ry. Co.*, 209 U. S. 108, 119; citing *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263; *Tennessee etc. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144; *Louisville & Nashville R. R. Co.* v. *Behlmer*, 175 U. S. 648; *East Tennessee etc. Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 190 U. S. 273.

In *Central Yellow Pine Association* v. *Illinois Central Railroad Co.*, 10 I. C. C. 505, 541–542, it was said:

> The Act to Regulate Commerce (section 1), in prohibiting unreasonableness of rates,

> in effect forbids whatever conduces to such unreasonableness. In any event, it is incumbent upon this Commission when the reasonableness of rates is in issue before it, to consider how those rates were brought about—whether they are the product of untrammeled competition or the result of a concert of action or combination between the carriers establishing and maintaining them.

This language was quoted with approval in *Tift* v. *Southern Railway Co.*, 10 I. C. C. 548, 581.

Again, in *Sioux City Terminal Elevator Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 27 I. C. C. 457, the Commission said that it "always has and necessarily must continue to recognize the effect of *bona fide* competition in the making of rates."

And in *Kiser Company* v. *Central of Georgia Ry. Co.*, 17 I. C. C. 430, 440, it is said:

> * * * Although the primary consideration in cases of this nature before the Commission is the reasonableness of the rates involved, through whatever agency established, the practical unification of carriers in increasing their rates may and should properly be taken into account in determining whether an increase is in fact justified or is the result of a concerted action without regard to the justness of the increased rate.

Nor does the matter of competition concern the fixing of rates alone. It is also to be considered in applying the provisions of sections 3 and 4 of the

act with reference to undue or unreasonable preference to persons, corporations, and localities, and the long and short haul clause. Said this court, speaking by Mr. Justice Shiras, in *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 164:

> In construing statutory provisions, forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable * * *.
>
> But the question whether competition as affecting rates is an element for the Commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court.

And at page 167:

> In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining

> the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration.

The subject is material, moreover, in connection with section 5 of the act (the pooling section), the object of which, it has been said, is to prevent "any contract, agreement, or combination" between otherwise competing carriers by which competition between them may be done away with. *Central Yellow Pine Association* v. *Illinois Central R. R. Co.*, 10 I. C. C. 505; *Tift* v. *Southern Railway Co.*, 10 I. C. C. 548, 580. And in *East Tennessee etc. Ry. Co.* v. *Interstate Commerce Commission*, 99 Fed. 52, 61, it is said:

> * * * The interstate commerce law, it is conceded, was intended to encourage normal competition. It forbids pooling for the very purpose of allowing competition to have effect.

In short, as Commissioners Clements and Marble well say in their concurring report in *The New England Investigation*, 27 I. C. C. 560, 617—

> No competition between carriers is unimportant. The fact that a line carries little tonnage does not prove that it is valueless to

the public. Its potential competition serves always to insure better service and fairer treatment by the other lines. Occasionally it has an influence upon rates. Moreover, any suppression of competition involves larger issues, including the injurious effect of private monopoly upon the competitive society which tolerates it, which must be discussed by those who are charged with the duty of legislation.

(b) Whether a carrier is subject to the act at all frequently depends upon the relation between it and other carriers.

Whether a carrier is within the control of the Commission in any respect not infrequently depends upon the relations existing between itself and others. These relations may be of a character to bring within the act a carrier which but for their existence would not be subject to it, as, for instance, where a railroad company whose road is wholly within the bounds of a single State voluntarily engages in interstate commerce by making arrangements with another for the continuous carriage of goods through another State. *Cincinnati etc. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184. There is no need to cite authorities to show that the existence of a common arrangement between carriers such as is dealt with in section 1 of the act, which may have the effect of bringing a carrier within the act and under the supervision of the Commission, is a fact about which the Commission is entitled to be informed.

(c) The inquiry of the Commission is proper as a basis for legislative recommendations, for legal prosecutions, and for many other purposes.

When it is remembered that neither the duties of the Commission nor the objects for which it was created are limited to the enforcement of the specific provisions of the Act to Regulate Commerce, but that it is also charged with the obtaining of such information as may be necessary as a basis of intelligent legislation by Congress upon all "questions connected with the regulation of commerce," it may well be asked what subject it is connected with carriers as to which the Commission may not inquire? What are the secrets, if any, that a carrier is entitled to withhold from the Commission?

This extra-administrative duty of the Commission to keep itself informed of the manner and methods in which the business of common carriers is conducted, not merely for the purpose of preventing violations of the act and enforcing its specific provisions, but for the "determination of questions connected with the regulation of commerce," and the further duty of "making such recommendations as to additional legislation relating thereto as the Commission may deem necessary," has received ample recognition by this court.

Thus in *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, the Commission was pursuing an investigation upon its own motion, and, in

the course of the inquiry, it was deemed important to inquire as to the ownership of stock in the Elgin, Joliet & Eastern Railway by the Illinois Steel Company. The witness refused to answer. The court said (p. 474):

> An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far toward defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce can not be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules.

In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, which involved the power of the Commission to require reports from common carriers and to prescribe a system of

bookkeeping and accounting, Mr. Justice Day, in delivering the opinion of the court, said (p. 208):

> * * * We must remember, also, in this connection, that under section 21 of the act the Commission is required to make a report each year to the Congress containing such information and data as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation as the Commission may see fit to make.

And in the dissenting opinion by Mr. Justice Day in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, in which Mr. Justices Harlan and McKenna concurred, it is said (pp. 423, 424):

> The reports of committees which accompanied the enactment of the Interstate Commerce Law in its original form show that importance was attached to the power conferred upon the Commission to make investigations as well as to make orders relating to specific complaints as to practices affecting the conduct of interstate commerce and the instrumentalities by which the same is carried on. It was to have a power of investigation, such as had been conferred upon similar bodies in the States and in the English acts regulating the subject, with a view to eliciting information important to be had, in order to lay the basis for intelligent and efficient action in the legislative branch of the Government to which the Constitution

has delegated power to regulate commerce among the States and with foreign nations.

In speaking of this power, Judge Cooley, the eminent chairman of the Commission, in its first annual report, said:

"This is a very important provision and the Commission will no doubt have frequent occasion to take action under it. It will not hesitate to do so in any case in which a mischief of public importance is thought to exist, and which is not likely to be brought to its attention on complaint of a private prosecutor."

In numerous instances investigations have been conducted by the Commission having in view the exercise of its authority to afford information as to the manner and methods in which corporations engaged in interstate commerce are conducting their business. These investigations have been undertaken upon the initiative of the Commission; witnesses have been subpœnaed; and testimony has been taken without objection from those interested that the power of the Commission conferred by the acts of Congress had been exceeded. While these considerations are not determinative of the extent of the powers conferred in the act, they are suggestive of the practical construction which those interested have put upon it.

As suggested in the last paragraph of the above quotation, an examination of the debates of Congress and the decisions of the courts will show that

it was upon information developed by the Commission and reported to Congress that the Elkins Law, the Safety Appliance Law, the Employers' Liability and Hepburn Acts, were successively based; in other words, the inquisitorial work of the Commission has been the basis of practically all congressional legislation affecting interstate carriers during the past 25 years.

3. Where the persons and subjects under consideration are within the field of the Commission's lawful activities, the courts will not inquire as to the ultimate object of the investigation.

The position of the defendant in error and that of the court below seem alike to be based upon the assumption that the purpose of the pending investigation is not to obtain information which will enable the Commission to enforce the Act to Regulate Commerce but to obtain information showing a violation of the Anti-trust Act or of some other law. To this we answer that if the Commission is authorized by law to make the investigation, any inquiry into its motive or purpose is out of place. In view of the broad and sweeping language in which the power to investigate is conferred, the courts will not be astute to devise limitations which Congress itself has not imposed.

On the contrary, the plenary power of the Commission has been repeatedly recognized and upheld. The performance of the duties of carriers to the public can only be efficiently enforced, as was said

by this court in *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 474,

> through the instrumentality of an administrative body representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules

as may from time to time be prescribed.

And, again, in *Interstate Commerce Commission* v. *Cincinnati etc. Ry. Co.*, 167 U. S. 479, 506:

> * * * It [the Commission] is charged with the general duty of inquiring as to the management of the business of railroad companies and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business.

And in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 438, it is said:

> The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts and their methods of dealing, and generally to enforce the provisions of the act;

while in *Interstate Commerce Commission* v. *Goodrich Transit Co., supra,* the Commission was held entitled to an accounting and disclosure of all the revenues of the Goodrich Transit Company, although more than 80 per cent of its revenues were

derived from business not within the regulatory power of the Commission, and of all the revenues of the White Star Line, although more than 99 per cent of its revenues were not within such regulatory power.

Notwithstanding the fact that this investigation was prompted by a resolution of the Senate, and that the Commission is requested to report the result to it, who can say that anything more will eventuate than the taking of steps by the Commission to enforce the provisions of the Act to Regulate Commerce if they shall be found to have been violated? Who shall say, on the other hand, that the Commission may not be persuaded as the result of the investigation to recommend to Congress further legislation?

Even if the investigation should divulge violations of the Anti-trust Act rather than of the Act to Regulate Commerce, that would not of itself end the Commission's power, for, as said by this court in *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93, while the Commission can not exercise its power to fix rates upon information gathered under the provisions of section 12 without a hearing, "the information may be used as basis for instituting prosecutions for violations of the law, and for many other purposes."

It may well be that the Commission might lay the result of its investigation before the Depart-

ment of Justice or might recommend to Congress additional legislation connected with the regulation of commerce partaking of the character of the Anti-trust Acts and calculated to prevent restraint upon competition.

Instances of past investigations conducted by the Commission similar in character to the one at bar, and susceptible of just such uses, may easily be found. Among many others may be mentioned, using the title given to them by the Commission, those "In the matter of consolidations and combinations of carriers, relations between such carriers, and community of interests therein, their rates, facilities and practices," 12 I. C. C. 277, July 11, 1907 (disclosing the unlawful combination of the Union Pacific and Southern Pacific railroads), and "The New England Investigation," 27 I. C. C. 560, June 20, 1913 (concerning the New York, New Haven & Hartford Railroad Company and its activities).

II.

In the course of this investigation the Commission was entitled to inspect the "accounts, records, and memoranda," including the correspondence, of the defendant in error.

Section 20 of the Act to Regulate Commerce gives the Commission the right of access at all times to all accounts, records, and memoranda kept by carriers subject to the act, and such is the access which

the Commission is now seeking. But in so far as the correspondence of the defendant in error is concerned, the right is challenged upon various grounds. These may now be considered.

1. The correspondence is not exempt from inspection merely because it is not of that class of accounts, records, and memoranda whose form the Commission has undertaken to prescribe.

It is contended, in substance, by the defendant in error that the right of the Commission to inspect " accounts, records, and memoranda " is restricted to those for which the Commission is empowered to prescribe and has prescribed forms, and that the Commission not only has not prescribed, but obviously could not prescribe, any forms for correspondence, and that any attempt to do so would be absurd.

It is true enough that the Commission has never pretended to prescribe forms for all records, accounts, and memoranda, nor for correspondence, and that it obviously could not do so. Congress clearly did not contemplate that it should, for the language which confers the power to prescribe forms is permissive only, saying that " the Commission *may, in its discretion,* prescribe the forms of any and all accounts, records," etc.

The statute, however, does not say that the Commission shall have access only to those accounts, records, and memoranda for which it has prescribed forms; on the contrary, it says in unquali-

fied terms that "the Commission shall at all times have access to *all* accounts, records, and memoranda kept by carriers subject to this act."

And so, again, it is declared that the Commission "may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine *any and all* accounts, records, and memoranda kept by such carriers."

Nor is this broad language in any wise limited by the further provision that "it shall be unlawful for such carriers to keep any other accounts, records, and memoranda than those prescribed or approved by the Commission." This must be taken, as a matter of course, to relate only to records of the character or class whose form has been prescribed, and not to forbid the carrier from keeping any other accounts, records, and memoranda of any other sort or upon any other subject whatsoever.

Section 20 also provides a penalty for the failure or refusal of a carrier to submit such accounts, records, and memoranda *as are kept* for the inspection of the Commission or one of its authorized agents or examiners; that is to say, such records as are kept either in pursuance of the rules prescribed by the Commission or otherwise.

Obviously these provisions mean what they say. Indeed, the very fact that the Commission is charged with the enforcement of the provision relating to the keeping of accounts, records, and

memoranda equally with all other provisions of the act emphasizes the necessity for its general access to the carriers' papers. If restricted in its right of inspection to records for which forms have been prescribed, it will be denied the opportunity to learn at first hand whether its instructions have been followed and whether a carrier does or does not keep upon the same subjects other "accounts, records, and memoranda than those prescribed by the Commission."

In many other respects the administration of the act in the hands of the Commission can not be effective unless the Commission is given free access to all the records of the carriers.

Without this means of informing itself the Commission will not be able to comply with the broad provisions of section 12, which authorize and require it to inquire into the management of the business of all common carriers subject to the act and to keep itself informed as to the manner and method in which such business is conducted, and to obtain from the carriers all information necessary to enable it to perform the duties and carry out the objects for which it was created. To fully perform the functions for which this section provides the Commission must have access to every written or printed paper or document of any kind which may throw light upon the business done. The contention that the letters received and copies of letters forwarded by the carriers would not throw light

upon such business would be so contrary to common knowledge and experience that it is not to be expected that any such contention will be made. The court will take judicial notice of the fact that in many instances the only detailed account of a business transaction is that contained in letters written by the parties. In many cases proof of such details could not be obtained in their absence. Those who write letters pass away, but the letters do not; they remain and constitute in part the full, complete, and permanent records which by section 20 of the act the carriers are required to keep, and to permit the Commission through its special agents or examiners to examine.

What is more likely to be the subject of correspondence, rather than a matter of bookkeeping, than those arrangements for unjust discriminations, undue and unreasonable preferences, special rates, rebates, drawbacks, and the pooling of freights, which the statute denounces? Can it be said that free access by the Commission to all correspondence of the carrier is not calculated to make it difficult for the carrier to secretly engage in such practices?

Reverting to the terms of section 20 we find, after the provisions which have been quoted and commented upon above, the following (Act of February 25, 1909, 35 Stat. 648, 649):

> * * * *Provided*, That the Commission may in its discretion issue orders specify-

> ing such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

This proviso clearly relates to more than the accounts, records, and memoranda for which the Commission may have prescribed forms. The word "document" is perhaps as all-embracing as any which could have been chosen. That it is recognized as including letters and copies of letters appears from the language of this court in *Wilson* v. *United States*, 221 U. S. 361, 377, where it is said:

> * * * The copies of letters written by the president of the corporation in the course of its transactions were as much a part of its documentary property, subject to its control and to its duty to produce when lawfully required in judicial proceedings, as its ledgers and minute books.

So, again, it may be truly said that letters are both records and memoranda. A letter, it has been frequently held, is a sufficient "note or memorandum" within the meaning of the statute of frauds; and, as is well known, letters and copies of letters are among the most important records of every business concern.

It is therefore respectfully submitted that the letters and copies of letters referred to in the petition for mandamus are included in the terms "ac-

counts, records, and memoranda " as employed in section 20 of the Act to Regulate Commerce, and of course that indexes to the letters and copies are also included in those terms because they are memoranda pertaining to the files in which the letters and copies are kept.

2. No peculiar privilege attends the so-called private and confidential correspondence between officers and agents of the defendant in error.

Defendant in error alleges that the correspondence, access to which was denied, contains private and confidential communications between its officers and agents regarding various matters that do not in any way pertain to the provisions of the Act to Regulate Commerce, nor to any other act of Congress, the provisions of which it is made the duty of the Interstate Commerce Commission to enforce, such as the internal affairs of the defendant in error, its proposed constructions and extensions in the future, its policies with competing and rival railroads, its relations to the labor organizations, and a variety of other subjects which are of a private and confidential nature.

This, again, is an effort to ingraft upon the language of the act an exception which the act does not contain. There is nothing to be found therein which so limits the power and duty of the Commission to keep itself informed as to exclude from its inquiry matters which the defendant in error claims to be of a private and confidential nature.

Nor does any right of privacy attach to corporate records as against the visitatorial power of the State, or of the National Government, where the corporate activities are in the domain subject to the powers of Congress. *Wilson* v. *United States*, 221 U. S. 361; *Wheeler* v. *United States*, 226 U. S. 478; *Grant* v. *United States*, 227 U. S. 74.

To permit an interstate carrier to decide for itself on any ground whatsoever what records it will and what it will not allow the Commission to inspect, clothes the carrier with power to nullify for all practical purposes the provisions of section 20, giving the right of inspection, and the provisions of section 12, giving the right to inquire into the conduct of the business of interstate carriers, and in consequence to prevent the effective enforcement of the cardinal aims of the statute. To permit this would render the statute futile and the Commission impotent.

But that Congress in enacting section 20 not only did not intend the Commission to be limited in its power of inspection to such records as might be submitted to the gaze of the general public, but expressly contemplated access by the Commission to records which the interests of the carriers might require to be treated as private and confidential, is affirmatively shown by the fact that it incorporated the following clause in the statute (34 Stat. 594):

> Any examiner who divulges any fact or information which may come to his knowl-

> edge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

3. The privilege asserted as to the correspondence between the carrier and its attorneys is no warrant for refusing the writ as to other documents.

It is asserted on the part of the defendant in error that the correspondence to which it denied the Commission access "also contains confidential, private, and privileged communications between the defendant and its attorneys at law" (R. 8); and the court below laid great stress upon the privileged character of these letters as a ground for refusing the writ.

It may be observed again that the language of the act is sufficiently broad to include these letters, as well as all other documents, and that there is no warrant for writing into the law any exceptions which it does not expressly contain. On the other hand, there is force in the suggestion that a privilege so ancient and well established as that governing communications between counsel and client is not to be overthrown except by language expressly directed to that end. So far as the present case is concerned, it is perhaps unnecessary to determine this ques-

tion, since the privilege, if it exists, can certainly not be used to protect any documents other than those which fall within it. And the court, if it were of opinion that such letters are exempt from examination by the Commission, could have so limited the order granting the writ of mandamus as to exclude this particular correspondence from the effect of the writ.

III.

The proposed examination is not an unreasonable search and seizure, nor does it violate any constitutional right of the defendant in error.

The object of the Fourth as well as of the Fifth Amendment is to protect the citizen from compulsory testimony against himself. In *Boyd* v. *United States*, 116 U. S. 616, the history of the adoption and the interpretation of the Fourth Amendment were fully discussed and the relation between that and the Fifth Amendment was declared. Mr. Justice Bradley, in delivering the opinion of the court, said (p. 633):

> We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a

> man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.

This language met with the entire approval of this court in the later case of *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, which involved the power of the Interstate Commerce Commission under the Act to Regulate Commerce to compel the testimony of witnesses and the production of contracts relating to the purchase by a railroad company of coal at the coal mines. It was held that the compelling of the testimony and the production of the documents did not deprive the witnesses of any rights under the Fourth and Fifth Amendments. In delivering the opinion of the court Mr. Justice Day, after stating the substance of the above quotation, said (p. 46):

> As we have seen, the statute protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate. Testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure.

The case at bar involves no question of the power of the Commission to compel witnesses to testify; it involves solely the right of the Commission to examine, by its authorized and duly appointed

agents, the records of a railroad corporation which is an interstate carrier.

It may therefore be questioned whether the defendant in error, being a corporation, and not entitled to plead the immunity of the Fifth Amendment, can plead the immunity of the Fourth Amendment. See concurring opinion by Mr. Justice McKenna in *Hale* v. *Henkel*, 201 U. S. 43, at page 82. That a corporation is not entitled to plead the immunity of the Fifth Amendment was declared in the opinion of the court in this case, which was delivered by Mr. Justice Brown, in the following language (pp. 74–75):

> * * * Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom beyond the protection of

his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law and in accordance with the Constitution. Among his rights are a refusal to incriminate himself and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. * * *

It is true that the corporation in this case was chartered under the laws of New Jer-

> sey, and that it receives its franchise from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws.

That a corporation can not restrict the production of its books and papers on the ground of self-crimination was also held in *Wilson* v. *United States*, 221 U. S. 361, wherein Mr. Justice Hughes, in delivering the opinion of the court, said (p. 382):

> What then is the status of the books and papers of a corporation which has not been created as a mere instrumentality of government, but has been formed pursuant to voluntary agreement, and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands

> the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It can not resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress.

True, it is said in the opinion of the court in *Hale* v. *Henkel* that an order for the production of books and papers by a corporation may constitute an unreasonable search and seizure within the Fourth Amendment if it is so sweeping in its terms as to call for the production of such a large portion of the records of the corporation that their absence will put a stop to the business of the company (pp. 76–77). But this has no application to the case at bar, for the Commission seeks only to inspect the records of the defendant in error; the seizure of those records, in the sense of a forcible dispossession of the defendant in error, is not contemplated. For this reason it is not necessary for the plaintiff in error to rely upon the dissent from the view

advanced in the opinion by Mr. Justice Brown, which was expressed in the concurring opinions by Mr. Justice Harlan (p. 78) and Mr. Justice McKenna (pp. 82–83).

Giving to the Fourth Amendment the application for which the defendant in error contends would amount not merely to limiting the inquisitorial power of the Interstate Commerce Commission, it would also operate to restrict the general power which is conferred upon Congress to regulate commerce among the States and to make laws necessary and proper to that end.

This court seems to have had this phase of the matter in mind when, at the end of the opinion in *Hale* v. *Henkel,* 201 U. S. 43, 77, it said:

> Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment.

Having the power to regulate, Congress must also be held to have the power to determine what means are appropriate for carrying into effect its control.

As was said with reference to the taxing power upon a similar contention in *Flint* v. *Stone Tracy Company,* 220 U. S. 107, 174, 176:

> It is urged in a number of the cases that in a certain feature of the statute there is a

violation of the Fourth Amendment of the Constitution, protecting against unreasonable searches and seizures. This Amendment was adopted to protect against abuses in judicial procedure under the guise of law, which invade the privacy of persons in their homes, papers and effects, and applies to criminal prosecutions and suits for penalties and forfeitures under the revenue laws. *Boyd* v. *United States,* 116 U. S. 632. It does not prevent the issue of search warrants for the seizure of gambling paraphernalia and other illegal matter. *Adams* v. *New York,* 192 U. S. 585. It does not prevent the issuing of process to require attendance and testimony of witnesses, the production of books and papers, etc. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25.

* * * * *

The contention is that the above section as originally framed and as now amended could have no legitimate connection with the collection of the tax, and in substance amounts to no more than an unlawful attempt to exhibit the private affairs of corporations to public or private inspection, without any substantial connection with or legitimate purpose to be subserved in the collection of the tax under the act now under consideration. But we can not agree to this contention. The taxation being, as we have held, within the legitimate powers of Congress, it is for that body to determine what

means are appropriate and adapted to the purposes of making the law effectual.

It is submitted that, since the power of investigation claimed by the Commission is sanctioned both by constitutional and legislative authority, it can not be said to contemplate an unreasonable search.

IV.

The right to inspect accounts, records, and memoranda, including correspondence, is not limited to those only which have come into being since August 28, 1906, but extends to all those in the possession of the carrier whenever created.

It was contended in the court below that the right of inspection having been created by the Hepburn Act, approved June 29, 1906, 34 Stat. 584, and effective August 28, 1906, attached only to those accounts, records, and memoranda which came into being after that date. As expressed in the letter addressed by the First Vice President of the defendant in error to examiner Carleton (R. 28),—"It is the opinion of our general counsel * * * that said section, as amended by what is commonly known as the Hepburn Act, approved June 29, 1906, effective August 28, 1906, is not retroactive, but prospective only, and relates exclusively to the particular 'accounts, records and memoranda' which have been kept in pursuance of said act, and, hence necessarily such as came into existence on and after the effective date of said act."

The court below discussed this contention, but declined to decide it, holding it not essential to the decision of the case.

It is difficult, indeed, to see on what such a contention can be based.

1. The act is not retrospective in a legal sense simply because it affords access to preexisting documents.

In *The Society etc.* v. *Wheeler,* 2 Gall. 104, 139, Mr. Justice Story defines a retroactive or retrospective law:

> * * * Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.

Perhaps this definition has never been improved upon. Accordingly this court held in *Sturges* v. *Carter,* 114 U. S. 511, that a law of the State of Ohio authorizing auditors to extend inquiries into returns of property for taxation over a period of four years next before that in which the inquiry is made, is no violation of that provision in the Constitution of that State which declares that "the General Assembly shall have no power to pass retroactive laws." Judge Story's definition was quoted with approval.

It is clear that the present statute is likewise not within this definition. The Hepburn Act as

a whole has comparatively little effect upon substantive rights, and the provision under consideration has none. The act is chiefly a remedial statute designed to protect the public interests; a fact to which, it has been said (27 Halsbury's Laws of England, p. 160), great weight is to be attached in determining whether a statute is or is not retrospective. The Commission in its report of 1907 said of the Hepburn Act (p. 6): "The substantive provisions of the original act, forbidding the exaction of unreasonable charges and prohibiting discriminations between persons and places, were unchanged by the legislation of 1906. The main purpose of that legislation was to provide more adequate means for the enforcement of rights and duties already declared to exist."

Holding that this provision of the statute gives the Commission authority to examine accounts, records and memoranda made before it went into effect does not amount to giving it a retrospective operation. Indeed had Congress in the Hepburn Act for the first time declared to be illegal the practices which have long been condemned by the Commerce Act the statute would not be truly retrospective, though it rendered invalid prior contracts or agreements which were valid when entered into by the parties. A statute is not necessarily retroactive or retrospective because its operation in a given case may depend on an occurrence anterior to its pas-

sage. *In re Scott,* 126 Fed. 981. To construe the Anti-trust Law of July 2, 1890, as applying to contracts made prior to its enactment, does not give it a retroactive or *ex post facto* effect. *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 316.

In *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467, reversing 133 Ky. 652, it was held that an agreement between the plaintiffs and the defendant railroad company by which the defendant agreed, in consideration of injuries received by the plaintiffs while passengers on the defendant's railroad, to issue to the plaintiffs free passes over its railroads during their lives, although valid when made, was rendered invalid by the Hepburn Act and could not be enforced against the company by suit. This decision was cited, and a similar view expressed, in the New York case of *Gill* v. *Erie R. R. Co.,* 151 App. Div. 131, 136.

In *Philadelphia etc. R. R. Co.* v. *Schubert,* 224 U. S. 603, wherein it was held that section 5 of the Employers' Liability Act of 1908, providing that exemptions from liability shall be void, applies to agreements made before the enactment of the statute, Mr. Justice Hughes, in delivering the opinion of the court, said (pp. 613–614):

> It is also insisted that the statute does not cover the agreement in this case, as it was made before the statute was enacted. But

that the provisions of section 5 were intended to apply as well to existing, as to future, contracts and regulations of the described character can not be doubted.

* * * * *

Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.

2. The intent of the act is to afford access to preexisting documents. Even if, when so construed, it can properly be called retrospective, it is none the less within the power of Congress.

There are no constitutional restrictions upon Congress in the matter of retrospective legislation as there are in some of the States. *Satterlee* v. *Matthewson,* 2 Pet. 380; *Sinking-Fund Cases,* 99 U. S. 700. And an act of Congress may act retrospectively when the language employed makes it clear that it shall so operate. *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 478.

The rule against giving a statute a retrospective operation is, after all, merely a rule of construction, and if it is clear that the legislative power intended an act to operate retrospectively, then, even though the intention is not declared in express words, it should be given that operation, if existing rights and obligations are not thereby impaired.

The main purpose of the Hepburn Act being to provide more adequate means for the enforcement of rights and duties declared to exist, one of the means so provided is the power of the Commission to inspect the records of interstate carriers. There is nothing to indicate that this power was to remain in abeyance until records should thereafter be created, nor can any such intent be ascribed with reason to Congress. Existing practices of interstate carriers which are condemned by the act, and which it is the duty of the Com-

mission to end, may have their origin in agreements entered into long before the act was passed. Present rates and discriminations may be the result of argeements in restraint of competition which are to be found in the files of earlier correspondence, or in memoranda or records of an earlier date. Having in mind the particular circumstances under which the provision was adopted, that it was designed to protect the public interest, and that it impairs no existing rights or obligations, but, on the contrary, is a means for their effective enforcement, it seems obvious that it was as much the purpose of the provision to enable the Commission to inspect the records which were made before as those which were made after it went into effect.

While the general rule is that statutes are to be considered as having only a prospective operation unless the legislative purpose and intent of giving them a retrospective effect is clear, this rule applies chiefly, if not only, to those statutes which affect some vested right or interest existing under a prior law. There is no room in this instance for the presumption stated in *Cameron* v. *United States,* 231 U. S. 710, 720, that—

> the law-making power is acting for the future and does not intend to impair obligations incurred or rights relied upon in the past conduct of men when other legislation was in force.

V.

The allegations of the petition are sufficiently definite to warrant the relief prayed.

The trial court in its opinion denying the writ of mandamus lays emphasis upon what it is pleased to call "the meager, vague, and extremely general statements" in the petition, and says that it can not grant the writ under the vague and general allegations of the complaint (R. 24, 25). While the allegations in the petition may be general, yet if the positions hereinbefore taken are sound, it contains all the allegations necessary to show the authority of the Commission to make the attempted investigation, the right of the Commission to examine the records, including the correspondence which it seeks to examine, and the right to the remedy for which it prays, with the possible exception (not hereby conceded) of the right to have the writ extend to the correspondence of the defendant in error with its attorneys at law.

It is certainly not to be expected that in a case of this character the Commission should set out the exact records or papers which it desired, or should catalogue and identify the correspondence (which it had never seen) to which access was sought. Manifestly this would be a wholly impossible task. The topics under consideration were sufficiently stated in the Commission's order and the Senate Resolution therein contained. In order fully to investigate those topics it sought to exercise the right given it by law of unrestricted access to the records

of the defendant in error, certainly to all those of a non-privileged character. The case turns on the existence or non-existence of this right, and relief must be granted or denied accordingly.

If it should be held that the prayer of the petition is too broad in that the writ prayed for would embrace correspondence between the defendant in error and its attorneys, that is to be met by restricting the writ and not by denying it. Whatever may formerly have been the rule, it is now well settled that the fact that the prayer in mandamus is for excessive relief does not preclude the granting of such relief as the relator is entitled to have under the facts stated. Nor does the old rule any longer obtain, although an alternative writ has issued. The peremptory or final order need not conform either to the prayer of the petition or to the alternative writ. Reason dictates and practice has now established that the court shall conform the remedy to the facts alleged and proved. *West Virginia Northern R. R. Co.* v. *United States* (C. C. A. 4th Cir.), 134 Fed. 198, 203.

CONCLUSION.

The judgment should be reversed and the cause remanded with directions to award the writ.

JOHN W. DAVIS,
Solicitor General.

THEODOR MEGAARDEN,
Attorney.

NOVEMBER, 1914.

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JAMES D. MAH
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No. 499

In the Supreme Court of the United States,

OCTOBER TERM, 1914.

THE UNITED STATES OF AMERICA, BY JAMES C. MCREYNOLDS, ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR, APPELLANT,

v.

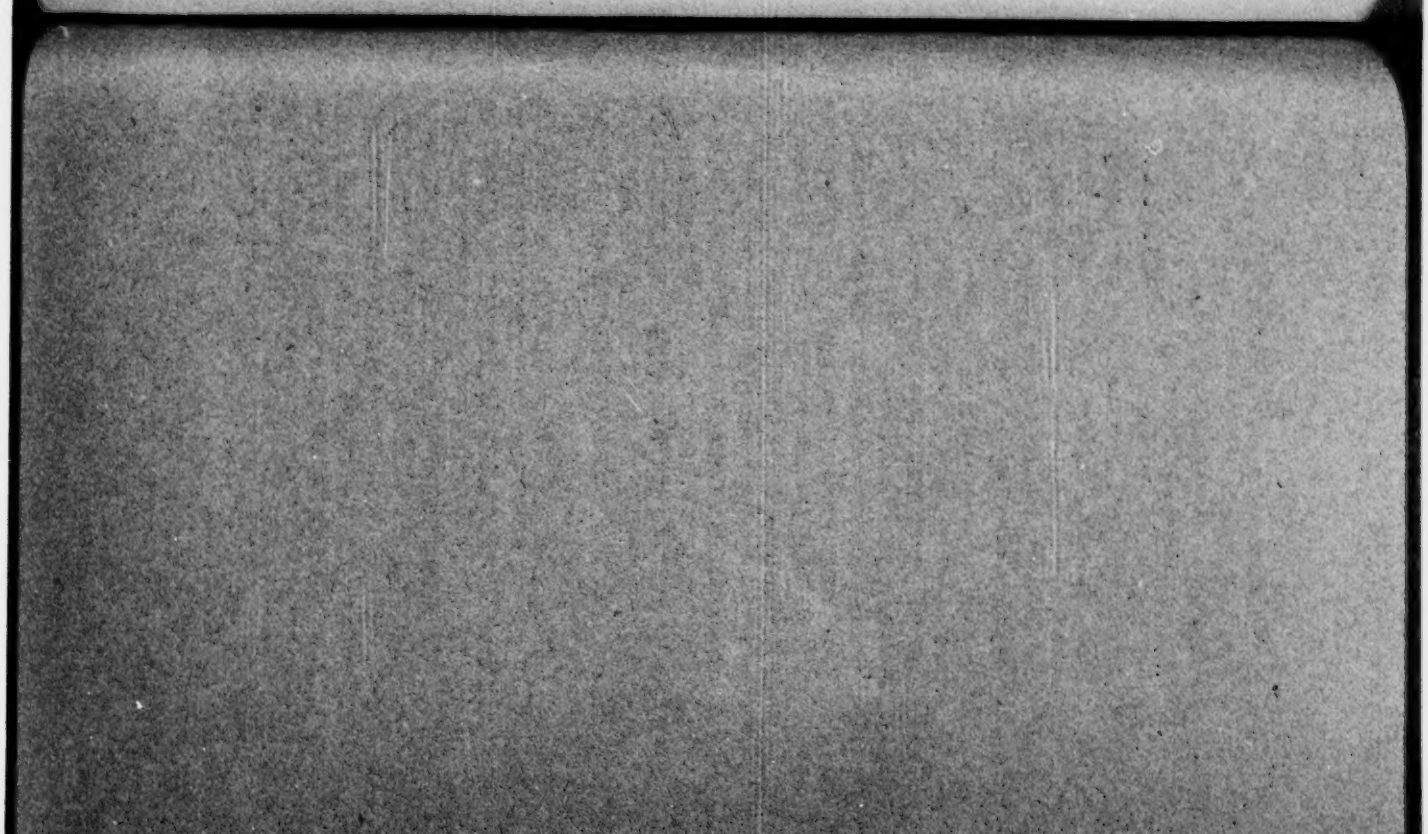
LOUISVILLE & NASHVILLE RAILROAD COMPANY, DEFENDANT IN ERROR, APPELLEE.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

Subject: Governmental visitation of railroad common carriers.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914



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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES OF AMERICA, BY James C. McReynolds, Attorney General of the United States, plaintiff in error, appellant,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, defendant in error, appellee.

No. 1087.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF CASE.

This proceeding was instituted by the district attorney of the United States for the Western District of Kentucky, under the direction of the Attorney General of the United States, at the request of the Interstate Commerce Commission, to obtain a writ of mandamus commanding the Louisville & Nashville Railroad Company to permit the Inter-

state Commerce Commission, through its examiners, to inspect and examine the accounts, records, and memoranda kept by said railroad, including the correspondence files and the indices thereto; that is, including letters received and copies of letters sent by said railroad and the indices to said letters and copies.

On November 6, 1913, the Senate of the United States adopted the following resolution:

> *Resolved,* That the Interstate Commerce Commission be, and the same is hereby, directed to investigate, taking proof and employing counsel if necessary, and report to the Senate as soon as practicable—
>
> First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;
>
> Second. What other railroad or railroads in the territory served by the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga and Saint Louis Railway;
>
> Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they

would be competitive to the various points in their territories;

Fourth. Any other fact or facts showing or tending to show the further relations between the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad or any of its subsidiaries or holding companies;

Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory, in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

Seventh. Any other fact or facts showing, or tending to show, the further relations between the Louisville and Nashville Railroad, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or facts showing, or tending to show, whether these relations restrict competition and maintain and fix rates;

Eighth. Any fact or facts showing, or tending to show, (*a*) the relations between the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah and Alabama Railroad, and any other railroads that have been purchased or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and (*b*) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia, and the arrangement made between the Louisville and Nashville and the Nashville, Chattanooga and Saint Louis Railway by which the former uses the tracks of the said Western and Atlantic Railway restrict competition, restrain trade, and determine and fix rates;

Ninth. Any fact or facts showing or tending to show, whether the ownership of the Louisville and Nashville Railroad and the Nashville, Chattanooga, and Saint Louis Railway of any railroad terminals or terminal companies, steamboats, and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dockyard at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly and restricts competition and determines and fixes rates;

Tenth. Any fact or facts showing, or tending to show, whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad

companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

Eleventh. What amount of stock, if any, the Atlantic Coast Line Company, or Atlantic Coast Holding Company owns in the Louisville and Nashville Railroad, and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates;

Twelfth. What amount, if any, the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, all or any of them have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

Thirteenth. (*a*) The number of free annual passes; (*b*) the number of free-trip passes; (*c*) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred

and eleven, to members of legislative bodies and other public officials, or at the request of members of legislative bodies and other public officials; (*d*) the total mileage traveled upon free passes issued under each of the above classifications; and (*e*) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads.

The above resolution may be summarized as calling for information on the following points:

(*a*) The amount of stocks and bonds or other securities of the Nashville, Chattanooga & St. Louis Railway owned and controlled by the Louisville & Nashville Railroad.

(*b*) The facts tending to show whether the relations between the Nashville, Chattanooga & St. Louis Railway and the Louisville & Nashville Railroad are such as to restrict competition and maintain fixed *rates.*

(*c*) Whether the ownership of terminals at certain points, and steamship lines, by the Louisville & Nashville Railroad Company affects *rates by restricting competition.*

(*d*) Whether the elimination of competition among the interstate carriers specified has any relation *to the rates fixed by said carriers.*

(*e*) Information respecting the issuance of free passes.

On November 10, 1913, the Interstate Commerce Commission ordered that a proceeding of inquiry

and investigation be made into and concerning the several matters and things set forth and referred to in the Senate resolution. The order of the Commission is set out in full in the appendix to this brief.

In obedience to the Senate resolution, under and by virtue of the power of visitation conferred upon the Interstate Commerce Commission by the act to regulate commerce, special agents and examiners were duly authorized by the Commission to inspect and examine the accounts, records, and memoranda of the Louisville & Nashville Railroad. The railroad declined and refused to permit the examiners to have access to certain of its records; that is to say, the railroad refused to allow either the Interstate Commerce Commission or its examiners access to or opportunity to examine correspondence received by the railroad before, on, or subsequent to August 28, 1906, or copies of correspondence sent out by the railroad before, on, or subsequent to said date, or the indexes kept with respect to said outgoing and incoming correspondence by said Louisville & Nashville Railroad Company. The access to this correspondence was refused by the Louisville & Nashville Railroad Company principally upon the ground that the correspondence contained private and confidential communications between the railroad and its officers, and private and confidential communications be-

tween the various officers and agents of the railroad, and between the railroad and its attorneys. The railroad alleged further that the Commission had no authority to examine said correspondence under the act to regulate commerce, and if the act gives such authority it would be in violation of the search and seizure clause of the Constitution.

Whereupon the Interstate Commerce Commission applied to the District Court of the United States, Western District of Kentucky, for a writ of mandamus to compel the defendant to give the Interstate Commerce Commission, its agents and examiners, access to said records and papers.

On the 25th day of March, 1914, the court refused to grant the writ of mandamus and dismissed the petition without prejudice. Thereupon the United States applied for and obtained a writ of error from the Supreme Court of the United States, and appealed from the District Court of the United States for the Western District of Kentucky to the Supreme Court of the United States.

THE ANSWER.

The answer of the Louisville & Nashville Railroad Company to the petition for mandamus opposed the issuance of the mandamus for access to correspondence records, in substance as follows:

1. Because its correspondence files contain private, privileged and confidential communications between officers and agents of the railroad and between the railroad and its attorneys.

2. If the act to regulate commerce gives the Interstate Commerce Commission authority to obtain such access it would be in violation of the fourth amendment as to unreasonable search and seizure of private papers of the railroad.

3. Because the Commission has no power or jurisdiction under the act to regulate commerce to investigate and report upon the matters set out in the Senate resolution.

4. Because the Hepburn Act, which went into effect August 28, 1906, is not retroactive, and, even if effective prospectively, does not give the right of access to accounts and records made prior to that date.

OPINION OF THE LOWER COURT.

The lower court denied the mandamus on substantially the following grounds:

1. Because the correspondence sought to be examined might contain private and confidential communications between the railroad and its officers and agents, and privileged communications between the railroad and its attorneys.

2. Because the petition does not specify the correspondence sought to be examined, nor state its contents.

3. Because an exact description of the records and papers which are to be examined should be set out in the petition.

4. Because, in the opinion of the court, this proceeding was an effort to enforce a resolution of the United States Senate.

ASSIGNMENTS OF ERROR.

The court below erred:

I. In denying to plaintiff the writ of mandamus prayed for in the petition herein.

II. In adjudging that the petition of the plaintiff be dismissed without prejudice.

III. In considering the affirmative averments of the answer, which are controverted by force of the act to regulate commerce, and in support of which no evidence was introduced.

IV. In holding that communications between the attorney of a railroad company engaged in interstate commerce and other officers of such company are privileged as against the Government.

V. In holding that communications between officers of a railroad company engaged in interstate commerce are privileged and can not be examined by the Interstate Commerce Commission under the law.

VI. In holding that the correspondence of a railroad engaged in interstate commerce is not a part of the accounts, records, and memoranda of such railroad.

VII. In holding that a railroad engaged in interstate commerce is entitled to have any secrets as against its creator, the Government.

VIII. In holding that correspondence desired to be examined must be specified and its contents stated; as it is manifestly impossible to know what is contained in the correspondence until it is ex-

amined and the purpose of the examination must be to ascertain if the correspondence contains any matter germane to the investigation by the commission.

IX. In holding that a railroad engaged in interstate commerce may judge for itself what part of its correspondence it will permit the Interstate Commerce Commission to examine.

X. In holding that the provisions of section 20 of the act to regulate commerce as amended did not apply to accounts, records, and memoranda made previous to August 28, 1906.

ARGUMENT.

I.

A railroad company engaged in interstate commerce performs the functions of the state. It is a quasi-public corporation. The correspondence of such a railroad can not be private or personal and immune from the powers of visitation in the Government.

(A) The Louisville & Nashville Railroad Company objects to the Interstate Commerce Commission having access to its correspondence on the ground that such correspondence is *private*. How and when did the correspondence of the interstate railroad become *private*? How can the letters written by a railroad corporation be private? It is not the personal correspondence of the officials of the road that the Interstate Commerce Commission asks to examine, but the correspondence of the *rail-*

road. A railroad, like other corporations, can only act through its officials. Its correspondence is naturally conducted by its officials; nevertheless, it is the correspondence of the railroad and not the personal correspondence of the officials. The official of a railroad is a quasi-public official. His correspondence for the railroad is not in any sense private, but in its very nature subject to governmental visitation. The claim of the railroad that its correspondence is private is as remarkable as if the Secretary of Commerce, for instance, were to object to an examination of his official correspondence by a committee of the United States Senate on the ground that his *official correspondence* is *personal* and *private.* The business affairs of railroads are not the private concern of those who operate these carriers, but they take their charters subject to the right of visitation by the Government.

> The State is the visitor of all corporations founded by it for public purposes. *Words and Phrases,* IV, 1190.

At common law the right of visitation was exercised by the king as to civil corporations. (1 Cooley's Blackstone, 481.) In the United States the legislature is the visitor of all corporations created by it. (1 Cooley's Blackstone, 482. *Dartmouth College* v. *Woodward,* Wheaton 4, 583.)

Kent's Commentaries, Volume II, side page 301, thus defines the visitatorial power:

> If the corporation be public, in the strict sense, the government has the sole right, as

> trustee of the public interest, to inspect, regulate, control, and direct the corporation, and its funds and franchises, because the whole interest and franchises are given for the public use and advantage.

The Federal Government has the same power of visitation over corporations engaged in interstate commerce as a State has with respect to the franchises granted by the State. *Wilson* v. *United States,* 221 U. S. 384; *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322. *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541.

The Supreme Court through Mr. Justice Day in *I. C. C.* v. *Goodrich Transit Co.,* 224 U. S. 194, at page 215, said:

> It is argued that Congress has not visitorial power over state corporations. We need not reassert the ample power which the Constitution has been construed to confer upon Congress in the regulation of interstate commerce, declared in the many cases in this court from *Gibbons* v. *Ogden* to its most recent deliverances. In *Hale* v. *Henkel,* 201 U. S. 43, 75, while general visitorial power over state corporations was not asserted to be within the power of Congress, it was nevertheless declared as to interstate commerce that the General Government had, in the vindication of its own laws, the same power it would possess if the corporation had been created by act of Congress.

In *Hale* v. *Henkel,* 201 U. S. 43, at page 75, the Supreme Court said:

> Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations.

The officials of the Louisville & Nashville Railroad hold corporate records and corporate correspondence subject to the corporate railroad duty. If the corporation were guilty of misconduct its officials could not withhold its papers to save it; and if the officials were implicated in violations of law they could not withhold the papers to protect themselves from the effect of their disclosures. This was said by Mr. Justice Hughes in the case of *Wilson* v. *United States,* 221, U. S., at page 384:

> The reserved power of *visitation* would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. It would not be a recognition, but an unjustifiable extension, of the

> personal rights they enjoy. They may decline to utter upon the witness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers. But the *visitatorial* power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian. [Italics ours.]

(B) This power of visitation by the Government over corporations has, in the instance of interstate railroad carriers, been delegated to the Interstate Commerce Commission by the act to regulate commerce. This carries with it authority to the Commission to examine the records of such carriers. The correspondence of a common carrier is a part of its records and documents.

> The copies of letters written by the president of the corporation in the course of its transactions were as much a part of its documentary property, subject to its control and to its duty to produce when lawfully required in judicial proceedings, as its ledgers and minute books. *Wilson* v. *United States*, 221 U. S., at page 377.

(C) The Louisville & Nashville Railroad claims, and the court below held, that it can not be required to permit the Interstate Commerce Commission to examine the railroad correspondence because the correspondence includes communications

between the railroad and its attorneys. If the rule announced by the court below is the law, then all a railroad need do in order to defeat the power of visitation by the Interstate Commerce Commission under the act to regulate commerce would be to make attorneys its principal officers. The attorney of a railroad engaged in interstate commerce is a quasi-public official and the rule of evidence concerning privileged communications between attorney and client can not apply to defeat governmental visitation as to communications between a railroad and its attorneys. It could with equal force be argued that communications between the Attorney General and district attorneys on public business are privileged, or communications between any department of the Government and the attorney for such a department are privileged, as to insist that communications between a public-service railroad and its attorney are privileged and exempt from examination by the Government.

Railroads are governmental agencies; railroad officials are public officers; railroad records are not private records and can not be withheld from the public on grounds of private business; railroad attorneys are not *private* attorneys; their communications are not clothed with that privilege that would attach to a communication between an attorney and a private client. Over and above all is the right and power of the Government as the visitor to see all. Mr. Justice Bradley in a dissenting opinion in *Wabash, St. Louis and Pacific Railway*

Company v. *Illinois,* 118 U. S. 557, at page 586, expressed what is now the accepted doctrine:

> The highways of a country are not of private but of public institution and regulation. In modern times, it is true, government is in the habit, in some countries, of letting out the construction of important highways, requiring a large expenditure of capital, to agents, generally corporate bodies created for the purpose, and giving to them the right of taxing those who travel or transport goods thereon as a means of obtaining compensation for their outlay. But a superintending power over the highways, * * *, always remains in the Government.

These propositions find support in *Railroad Company* v. *County of Otoe,* 16 Wall. 667, at page 673, as follows:

> The State may establish highways or avenues to markets by its own direct action, or it may empower or direct one of its municipal divisions to establish them, or to assist in their construction. Indeed, it has been by such action that most of the highways of the country have come into existence. They owe their being either to some general enactment of a State legislature or to some law that authorized a municipal division of the State to construct and maintain them at its own expense. *They are the creatures of law, whether they are common county or township roads, or turnpikes, or canals, or railways.* And that authority given to a mu-

> nicipal corporation to aid in the construction of a turnpike, canal, or railroad is a legitimate exercise of legislative power, unless the power be expressly denied, is not only plain in reason, but it is established by a number and weight of authorities beyond what can be adduced in support of almost any other legal proposition. The highest courts of the States have affirmed it in nearly a hundred decisions, and this court has asserted the same doctrine nearly a score of times. It is no longer open to debate. [Our italics.]

A leading case on the subject is *Olcott* v. *The Supervisors*, 16 Wall. 678. The precise point is stated at page 691. The court said:

> That the State might itself make such an improvement, and impose taxes to defray the cost, or exercise its right of eminent domain therefor, was beyond question. Yet confessedly it could neither take property or tax for such a purpose, unless the use for which the property was taken or the tax collected was a public one. And it was also the undoubted law of the State *that building a railroad* or a canal *by an incorporated company was an act done for a public use,* and thus the power of the legislature to delegate to such a company the State right of eminent domain was justified. [Italics ours.]

On page 695 of the Olcott case the court said:

> Whether the use of a railroad is a public or a private one depends in no measure upon

the question who constructed it or who owns it. *It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State.* [Italics ours.] Though the ownership is private the use is public. So turnpikes, bridges, ferries, and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris.* The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. *Charles River Bridge Co.* v. *Warren*, 7 Pick. 495. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge. Cooley's Const'l Limitations.

In *Louisville & Nashville R. Co.* v. *Kentucky*, 161 U. S. 677, at page 696, it was said:

> There was a difference of opinion in the court as to whether this language applied to elevators in such manner as to empower the legislature to fix their charges; but it has been too often held that railways were public highways, *and their functions were those of the State* [italics ours], though their ownership was private, and that they were subject

to control for the common good, to be now open to question. It was so expressly stated in *Olcott* v. *Supervisors,* 16 Wall. 678, 694.

In *Smyth* v. *Ames* (the Nebraska Rate case), 169 U. S. 466, at page 544, the court said:

> A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. *Such a corporation was created for public purposes. It performs a function of the State.* [Italics ours.] Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the constitutional guarantees for the protection of its property. (*Olcott* v. *The Supervisors,* 16 Wall. 678, 695; *Sinking Fund Cases,* 99 U. S. 700, 719; *Cherokee Nation* v. *Southern Kansas Railway,* 135 U. S. 641, 657.) It can not, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests and ignore the rights of the public.

In *Wisconsin, Minnesota and Pacific Railroad* v. *Jacobson,* 179 U. S. 287, at page 296, it was said:

> Railroads have from the very outset been regarded as public highways, and the right and the duty of the Government to regulate in a reasonable and proper manner the conduct

> and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the Government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions.

The case which has reviewed all these opinions, *Donovan* v. *Pennsylvania Company,* 199 U. S. 279, states the following, page 292:

> Much has been said in argument as to the functions and duties of railroad companies. Under the decisions of this court, there can be no doubt as to the nature of those functions or duties. In *New Jersey Steam Navigation Co.* v. *Merchants' Bank* (6 How. 344, 382) this court held that a corporation engaged, under legislative authority in the transportation of passengers and freight over navigable waters, was " in the exercise of a sort of public office and has public duties to perform." In *Olcott* v. *The Supervisors,* 16 Wall. 678, 694, 695, it was adjudged that a railroad, whether constructed by a private corporation or by individuals under the authority of a legislative grant, or by the State itself, was a public highway, and that the function performed by the corporation was that of the State, and the uses to which its property was devoted were of a public nature. In *Queensbury* v. *Culver,* 19 Wall. 83, 91, it was said that the con-

> struction or maintenance of a public highway was "for the promotion of a public use." So in *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 676, which involved the validity of taxation under legislative authority to aid in the construction of a railroad by a corporation: "Though the corporation was private, its work was public, as much so as if it were to be constructed by the State."

In *C. B. & Q. Ry.* v. *Drainage Commissioners* (200 U. S. 561, at page 588) the court declared:

> It has been so often said that it need only be adverted to here, that corporations such as appellant (railroad) do not hold their property and exercise their franchises strictly in a private right, but from the nature of their business and their relation to society they are public corporations in a sense and are subject to public control and regulation. * * *

Records consisting of books, papers, and correspondence in the possession of officials of railroads exercising prerogatives under grants by the Government and existing under governmental franchises are in their possession as public agents, and they are subject to the right of the public to examine them, through the official representatives of the public.

(D) By section 12 of the act to regulate commerce the Commission is authorized and required to inquire into the management and business of all

common carriers subject to the provisions of the act and keep itself informed as to the manner and methods in which the business is conducted, and to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created. How is the Commission to keep itself informed as to the manner and method in which the business of a common carrier is conducted? Certainly by examination of its books and records. The business of a common carrier is evidenced by its books and papers, including its correspondence. Indeed, in many instances the only account existing of the transactions of a carrier is contained in letters written by or to the carrier. The application of tariffs is, for instance, often construed by correspondence between the general officers and the local officers of the carriers. If unlawful agreements between carriers as to pooling of freight or division of territory exist, they would generally be evidenced by correspondence rather than by book entries. The entries in the books alone might be misleading, or give little light. Full information can be obtained only by examination of all books, papers, and documents, including correspondence. If the Commission is denied access to correspondence it would be impossible for it to inform itself fully as to the business conducted by the carrier. Suppose the funds of the carrier are dissipated in campaign

contributions or in the securities of other companies. These items might be placed upon the books, and often are, in such a way as to give little information, and the illumination afforded by the correspondence is necessary in order to furnish complete knowledge. Could an examiner of a national bank fully inform himself as to the business conducted by the national bank without access to the correspondence of the bank? Suppose a national bank should take the position that its correspondence is *private* and that the letters between itself and its attorneys are *privileged*. We do not believe that any court would sustain such an attitude.

The power of visitation conferred upon the Commission by the act to regulate commerce is not a strange or unknown power, nor is it a power exercised by the Government only with reference to railroads. For a long period of time it has been the practice of both the State and National Governments to require businesses, trades, and occupations to make reports of such a nature and submit to examination their business papers and the conduct of their business evidenced by their books, papers, and records. Such examinations are familiar as relating to the business of banking, insurance, distilling, tobacco, oleomargarine, and the collection of revenue. The new Federal Trade Commission is a recent example of the delegation by Congress of the power of visitation over corporations engaged in interstate commerce other than common carriers.

Corporations have no rights but legal rights. They can not assert any rights or privileges except those granted them by law. They have no legal right to secrecy as against the Government. The law does not confer upon them the privilege of concealing their papers from the searchlight of the Government. The provisions of sections 12 and 20 giving the Commission visitatorial power as to books, papers, and memoranda of railroads are parts of the charter of every railroad, for all such charters are subject to the laws of the land. A corporation, a creature of the law, is bound to the law by the ties of its creation and its being. By accepting the act of incorporation it undertakes to perform all public duties and assumes all obligations required by it. A railroad can not claim any vested right to secrete its correspondence from the eyes of its creator—the Government.

(E) Ordinarily, corporations engaged in interstate commerce are created by the laws of the States, and the power of regulation and control, to which the power of visitation is ancillary, is prescribed in great detail in the State laws. Every act done or transaction had by the corporation must be open and fully disclosed to the State upon request. In *Hale* v. *Henkel,* 201 U. S., page 74, the court said:

> Upon the other hand the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and

> franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporation books and papers for that purpose.

As has been pointed out above (p. 13), the authority of the Federal Government to enact laws for the *visitation*, regulation, and control of corporations engaged in interstate commerce is as full and complete as the power of a State to enact such laws within the limits of its territory. Under and by virtue of the power given to Congress over interstate commerce by the Constitution the national lawmaking body has, by express enactment, conferred the power of visitation upon the Interstate Commerce Commission as to all railroads engaged in interstate commerce. Section 11 of the act to regulate commerce created and established

the Interstate Commerce Commission, and section 12 invested the Commission with power and—

> authority to inquire into the management of the business of all common carriers subject to the provisions of this act. * * *

Section 13 provides—

> the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act.

Section 20 of the act provides for reports to be made annually to the Commission by all common carriers subject to the act, and the Commission may require—

> from such carriers specific answers to all questions upon which the Commission may need information. * * * Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or

contracts affecting the same, as the Commission may require. * * * The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. *The Commission shall at all times have access to all accounts, records, and memoranda kept by the carriers subject to this Act* [italics ours], and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. * * * In case of failure or refusal on the part of such carrier * * * to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier * * * shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense * * * provided that the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be

destroyed, and prescribe the length of time such books, papers, or documents shall be preserved.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission, or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term of not exceeding two years, or both.

That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate Commerce, or of any Act supplementary thereto or amendatory thereof by any common carrier, *to issue a writ or writs of mandamus* [italics ours] commanding such common carrier to comply with the provisions of said Acts, or any of them.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

Section 21 provides that the Commission shall make an annual report to Congress.

This report shall contain such information and data collected by the Commission as may

> be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary;

(*a*) In fact, the law employs such comprehensive language in describing what may be examined, that every paper which contains any note or transaction of the defendant must be exhibited if called for. To permit the defendant to withdraw any part of its records from the scrutiny of the visitorial power would defeat the investigation; to exempt a part of the records, *letter files,* and *correspondence* from examination would enable the defendant to conceal its transactions in its letter files and render the act of Congress a nullity. No exception was made in the statute as to visitation of letter files or even privileged communications. The visitatorial power is absolute.

The authority of the Interstate Commerce Commission in carrying out its duties under the act is well expressed in the *Brimson* case, 154 U. S. 447, at page 471, quoting from *Gibbons* v. *Ogden,* the court said:

> This power (to regulate commerce), like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. * * *

Continuing, at page 472, the court said:

> The same observation may be made in respect to those provisions empowering the Commission to inquire into the management of the business of carriers subject to the provisions of the act, *and to investigate the whole subject of interstate commerce as conducted by such carriers, and in that way to obtain full and accurate information of all matters involved in the enforcement of the act of Congress.* [Italics ours.] It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. * * * Interpreting the interstate commerce act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which Congress may rightfully subject to investigation by a commission established for the purpose of enforcing that act, we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly and indirectly, imposed upon it by means of unjust and unreasonable discriminations, charges, and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled

principle of constitutional law that "the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that one exception." 4 Wheat. 316, 409. The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. *The judiciary can only inquire whether the means devised in the execution of the power granted are forbidden by the Constitution. It can not go beyond that inquiry without entrenching upon the domain of another department of the Government.* [Italics ours.] *Sinking Fund cases,* 99 U. S., 700, 718.

An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far toward defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the sub-

> ject of interstate commerce can not be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information *but of compelling by all lawful methods obedience to such rules.* [Italics ours.]

In *Wilson* v. *United States,* 221 U. S., 361, the court was speaking of an ordinary corporation. With how much added force must the visitatorial power be considered in reference to quasi-public corporations such as railroads. The court, through Mr. Justice Hughes, at page 377, said:

> For there can be no question of the character of the books here called for. They were described in the subpœna as the books of the corporation, and it was the books so defined which, admitting possession, he withheld. *The copies of letters written by the president of the corporation in the course of its transactions were as much a part of its documentary property, subject to its control and to its duty to produce when lawfully required in judicial proceedings, as its ledgers and minute books.* [Italics ours.] It was said in the appellant's statement before the grand jury that the books contained copies of his "personal and other correspondence as well as copies of the correspondence relating to the business and affairs" of the cor-

poration. But his personal letters were not demanded; these the subpœna did not seek to reach; and as to these no question of violation of privilege is presented. Plainly he could not make these books his private or personal books by keeping copies of personal letters in them. Had the appellant merely sought to protect his personal correspondence from examination it would not have been difficult to have provided, under the supervision of the court, for the withdrawal of such letters from scrutiny. Indeed, on the hearing of the second presentment, the court suggested their removal from the books. But the appellant was not content with protection against the production of his private letters; he claimed the privilege to withhold the corporate books and the documents which related to corporate matters and with respect to which he had acted in his capacity as the executive officer of the corporation. And that is the right here asserted. * * *

Continuing at page 382:

What then is the status of the books and papers of the corporation, which has not been created as a mere instrumentality of government, but has been formed pursuant to voluntary agreement, and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection or must be kept or filed in

a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporation organization. *But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books.* [Italics ours.] That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It can not resist production upon the ground of self-crimination. Although the object of inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, *it must submit its books and papers to duly constituted authority when demand is suitably made.* [Italics ours.] This is involved in the reservation of the *visitatorial* [italics ours] power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress.

Proceeding with the opinion in *Wilson* v. *United States, supra,* page 384, the court said:

> The reserved power of *visitation would seriously be embarrassed* [italics ours], if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. * * * *But the visitorial* [italics ours]

power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian.

In *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, at page 348, the Supreme Court, through Mr. Justice White, said:

> We say this because it was in that case (*Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541) determined in view of the *visitorial* [italics ours] powers of a State over corporations doing business within its borders and the rights of the State to know whether the business of a corporation was being carried on in a lawful maner, that it was competent for the State to compel the production of the books and papers of the corporation in an investigation to ascertain whether the laws of the State had been complied with. And of course such power embraces the authority to require the giving of testimony by the officers, agents and other employees of the corporation for like and analogous purposes. * * * As these subjects were within the scope of the *visitorial power* [italics ours] of the State and concerning which it had the right to be fully informed, the mere incident or purpose for which the lawful power was exerted affords no ground to deny its existence. In *Consolidated Rendering Co.* v. *Vermont,* the books and papers were required for an investigation before a grand jury concerning *supposed misconduct of the corporation.*

> [Italics ours.] The power to compel the production to ascertain whether wrong had been done, in the nature of things, as the greater includes the less, is decisive as to the right to exact the production for the purpose of proof in a pending cause. * * *

(*b*) The point made by the defendant that the papers sought by the Commission are privileged communications, can not be sustained for the further reason that the practice of withholding proofs on this ground is simply a rule of evidence found to be expedient in judicial proceedings in certain instances, and has no application to the exercise of the power of visitation by the Government. There can be nothing withheld by carriers engaged in interstate commerce from examination by the Government. There can be no secrets. There can be no confidences not reposed in the sovereign. The creator, under its express power of visitation, has unrestrained access to all the papers, records, documents, and transactions of its interstate carriers.

(F) The act to regulate commerce is remedial in its nature, and will, therefore, be construed by the court in a manner which will accomplish the purpose the framers of the act had in view, if such construction will not conflict with the plain import of the language employed. By the act Congress intended to prevent common carriers engaged in the transportation of persons and property in interstate commerce from exacting unreasonable

rates of transportation; from unjustly discriminating between different persons by the application of special rates, by the payment of rebates, drawbacks, or by other devices; from giving one person, place, or description of traffic undue and unreasonable preference and advantage, and subjecting another person, place, or description of traffic to undue and unreasonable prejudice and disadvantage; from pooling of freight by different competing railroads, or dividing between them the net proceeds of the earnings of such railroads, or any portion thereof, and to prevent departure by any means whatsoever from the rates and charges which such carriers are by the provisions of the act required to publish and file with the Interstate Commerce Commission. The Interstate Commerce Commission was created to enforce the provisions of this act. By section 12 of the act it is provided:

> That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act. * * *

It is therefore entirely clear that the Congress intended to authorize the Commission through its agents and examiners to inform itself fully concerning all business done by common carriers subject to the act and compare the information thus obtained with the information given in reports made to the Commission from time to time by the carriers through their own officials. It follows that it was the purpose of Congress to give the Commission access to every piece of paper or document which might throw light upon the business done by the carrier. The contention that letters received and copies of letters forwarded by the carrier would not afford any light upon the business of the carrier would be entirely contrary to common knowledge and the common experience of mankind. This conclusion is emphasized by the provisions of section 20, which is a part of the Hepburn Act which went into effect August 28, 1906. A portion of section 20 referred to, reads:

> The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. *The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this act.* * * * [Italics ours.]

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It is contended by counsel for the defendant in error that this section only gives the Commission power to examine accounts, records, and memoranda for which it prescribes the form. This contention, however, leaves out of consideration the plain wording of the section, which makes it discretionary on the part of the Commission to prescribe the forms. Suppose the Commission had not prescribed any forms? Could it be fairly concluded that, therefore, the Commission would have access to no accounts, no records, and no memoranda of the carrier? The Commission might prescribe the form in which correspondence should be preserved and the forms of indices thereto. The fact that it has not prescribed such forms would not preclude it from access to indices kept by the carrier, or the correspondence, any more than failure on the part of the Commission to prescribe the form of books and accounts kept by the carrier would prevent the Commission from examining such books as might be kept by the carrier. The Commission might prescribe the form of preserving correspondence—whether in carbon copies, letterpress copies, or some other form. This the Commission has not done because it has evidently not seemed necessary. By what process of reasoning can it be assumed that the Commission has therefore forfeited the power of visitation conferred by the act to regulate commerce? May the carrier conceal from the Government all of its business transactions except those

shown in the forms of record prescribed by the Commission? It manifestly was not the intention of Congress to confine the authority of the Commission to the accounts, records, and memoranda kept in such form as the Commission has prescribed or may prescribe.

In section 20 the following proviso appears:

> *Provided,* That the Commission may, in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

This clearly shows that Congress intended to include documents in the term "accounts, records, and memoranda," and the Supreme Court of the United States has, as we have indicated above, held that copies of letters are documentary property. *Wilson* v. *United States,* 211 U. S. 361.

It would, indeed, be a strange anomaly if the Commission, having the power under the proviso of section 20 to order books and papers, including correspondence, *destroyed,* had no power to *examine* the correspondence. The fact that the Commission may prescribe the length of time that documents shall be preserved indicates that there must have been some purpose in the mind of Congress in preserving such documents or correspondence. Within the time so prescribed the carrier may not lawfully destroy

such documents or correspondence. Why should such documents or correspondence be preserved for the length of time prescribed by the Commission? The only reason could be for the purpose of inspection. Inspection by whom? Necessarily by the Interstate Commerce Commission through its examiners and agents. This conclusion would seem to be irresistible.

(G) If the Interstate Commerce Commission is denied, or has no authority under the act to see correspondence, then its power of visitation into the business of carriers would be largely nullified. Such business as the carrier might desire to keep from the knowledge of the Commission could be secreted in its correspondence. If any class of correspondence is exempt from examination by the Commission, then all matters desired to be concealed from the Government by the carrier could be placed in the privileged class. The power of visitation given by sections 12 and 20, to be effective, must be unlimited as to all of the accounts, records, and memoranda of the carrier, including its correspondence.

While the statute authorizes the Commission, *in its discretion,* to prescribe the forms of " any " and " all " accounts, records, and memoranda " *to be* kept," in the future, it grants the Commission access *at all times* to " *all* accounts, records, and memoranda *kept,*" that is, actually kept, whether in prescribed form or not, and then makes it unlawful

for such carriers "to keep any other accounts, records, or memoranda than those prescribed *or approved* by the Commission." This contemplates that some may have been prescribed; others, not prescribed, may be approved.

It then authorizes the Commission "to employ special agents or examiners who shall have authority under order of the Commission to inspect and examine *any and all accounts, records, and memoranda kept* by such carriers." How is the Commission to ascertain whether any carrier has committed the act here made unlawful of keeping *any* other accounts, records, and memoranda than those prescribed or approved by the Commission, if its examiners have no access except to those kept in the form "prescribed"? Or, again, how can the Commission "*approve*" what it has not seen?

The statute then fixes a forfeiture of $500 for failure or refusal to *keep* such accounts, records, and memoranda *in the manner prescribed* by the Commission. This forfeiture could not be collected in cases where no manner had been prescribed.

It further fixes like forfeiture for failure or refusal "to submit such accounts, records, and memoranda *as are kept*," without qualification in respect of the manner or form of keeping, "to the *inspection* of the Commission or any of its authorized agents or examiners."

Thus far the statute deals with the carrier and not with the individual acting for the carrier.

In the following paragraph, however, it stamps as criminal certain acts of such individuals. It provides that any person who—

> (*a*) " shall willfully make any false entry in the accounts of *any* book of accounts, or in *any* record or memoranda kept by a carrier,"

without qualification as to the form or manner *prescribed,* or *approved,* by the Commission; or—

> (*b*) " shall willfully neglect or fail to make full, true, and correct entries in *such* accounts, records, or memoranda "—

viz, those actually *kept*—

> " of all facts and transactions appertaining to the carrier's business "—

again without qualification as to the form or manner prescribed by the Commission; or—

> (c) " shall keep any other accounts, records, or memoranda than those prescribed *or approved* by the Commission—"

shall be deemed guilty of a misdemeanor and subject, upon conviction, to a fine ranging from $1,000 to $5,000, or imprisonment for a term ranging from one to three years, or to both such fine and imprisonment.

The making of false entry in accounts, records, and memoranda *actually kept,* the failure to make full, true, and correct entries therein, and the *keeping* of any other accounts, records, and memoranda than those prescribed or approved by the

Commission, are separate offenses, but of equal gravity, and bear the same penalty; that is, when the Commission has prescribed or approved the form of records or memoranda, no other may lawfully be kept, but the carrier obviously may as a matter of fact keep records or memoranda which are neither prescribed nor approved and which cannot be approved or disapproved until seen. The *access* of the Commission is to *all,* whether prescribed or not prescribed, whether approved or not approved.

II.

The examination of the correspondence of a railroad engaged in interstate commerce can not be an unreasonable search or seizure, for the constitutional provision regarding search and seizure applies only to private papers, while documents of a railroad engaged in interstate commerce are subject at all times to governmental visitation.

In the case of *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, Mr. Justice Day, in disposing of the contention that to require Baird to appear before the Interstate Commerce Commission and produce certain papers amounted to an unreasonable search and seizure, said at page 46:

> Testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure.

Again, the court said, page 45:

> The origin and interpretation of the Fourth Amendment to the Constitution, securing immunity from unreasonable searches and seizures, was fully discussed by Mr. Jus-

> tice Bradley in the leading case of *Boyd* v. *United States,* 116 U. S. 616. In that opinion the learned Justice points out the analogy between the Fourth and Fifth amendments, and the object of both to protect a citizen from compulsory testimony against himself which may result in his punishment or the forfeiture of his estate, or the seizure of his papers by force, or their compulsory production by process for the like purpose.

An officer of a corporation can not plead the criminality of the corporation as an answer to a demand for the inspection of the papers of the corporation; no more may an officer of an interstate railroad plead, in answer to a demand for the inspection of the papers of the railroad, that such inspection would be an unreasonable search and seizure of the papers of the *corporation. Private* papers are not involved, only *corporate* papers.

In *Hale* v. *Henkel,* 201 U. S. 75 (l. c.) the court said:

> The defense amounts to this: That an officer of a corporation, which is charged with the criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand

when charged with an abuse of such privileges.

In *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541, at page 553, it was held that:

> The objection that the notice authorized by the statute amounted to an unreasonable search and seizure of the private books and documents of the company is also not well founded.

In *Wilson* v. *United States,* 221 U. S. 376, it was said:

> There is no unreasonable search and seizure when a writ, suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced.

In *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 347, the question that the order to produce was so general and indefinite as to amount to an unreasonable search and seizure is referred to, and the court held that in view of the visitorial power of the State over corporations and the right of the State to know whether the business of a corporation was being carried on in a lawful manner that it was competent for the State to compel the production of the books and papers of the corporation in an investigation to ascertain whether the laws of the State had been complied with, and in such cases the charge of an unreasonable search and seizure could not be sustained.

In *Wilson* v. *United States,* referred to above, 221 U. S., at page 380, the question under consideration was whether the production of letterpress copy books of a corporation would be enforced for inspection and examination by a grand jury. After showing that the production of public records and official documents may be enforced, the court said:

> The principle applies not only to public documents in public offices, but also to records *required by law to be kept* in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, can not be maintained.
>
> * * * Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the *visitorial* power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress. [Italics ours.]

In *Wheeler* v. *United States,* 228 U. S. 478, it was held:

> Books of a corporation are not the private books of any of the officers and do not be-

> come so by the dissolution of the corporation and the transfer of the books to one of such officers.

In *Grant* v. *United States,* 227 U. S. 74, the court, through Mr. Justice Hughes, held:

> Professional privilege does not relieve an attorney from producing under subpœna of the Federal grand jury books and papers of a corporation left with him for safe-keeping by a client who claimed to be owner thereof.
>
> Notwithstanding a corporation ceases to do business and transfers its books to an individual, the books retain their essential character and are subject to inspection and examination of the proper authorities and there is no unreasonable search and seizure in requiring their production before the grand jury in a Federal proceeding.

There can be no communications privileged as against the Government respecting the business of public carriers. In *Adams* v. *New York,* 192 U. S., at page 598, the Supreme Court declared:

> The security intended to be guaranteed by the Fourth Amendment against wrongful search and seizures is designed to prevent violations of *private security* in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted. [Italics ours.]

The search and seizure clause of the Constitution can not be invoked to prevent the visitatorial power of the Government being exercised as to the papers and documents of quasi-public corporations.

In *Hale* v. *Henkel,* 201 U. S. 43, the court, after laying down the principles of law we have quoted in this brief, held the subpœna under the peculiar facts of that particular case was too broad. That case is easily distinguishable from the case at bar. *Hale* v. *Henkel* was a *criminal* proceeding before the grand jury under the *Sherman Antitrust Act,* and subpœnas *duces tecum* had been issued to compel the witness to produce a mass of papers that could not be produced without stopping the business of the company.

Under the circumstances of that case the subpœnas were held to be too general and within the unreasonable search and seizure provision. This is a different proposition from that under discussion in the case at bar which involves the *visitatorial* power of the Government over common carriers delegated to the Interstate Commerce Commission.

Though the Federal Government possesses the power to regulate ordinary corporations engaged in interstate commerce, no specific *visitatorial* power has, until recently, been conferred upon any official body for this purpose, while, on the other hand, express visitatorial, investigating, and regulating power over *railroads* engaged in interstate commerce has been vested in the Interstate Commerce

Commission, and the law imposes upon that body a positive duty to give effect to these several purposes. Congress has authorized the agents of the Commission to examine the corporate books in question, and has ordered that the common carrier corporations shall give access to their papers and records to such examiners, which had not been done in connection with the Sherman antitrust law, under which Hale was being proceeded against. The court said in that case:

> Of course in view of the power of Congress over interstate commerce to which we have adverted we do not wish to be understood as holding that an examination of the books of a corporation, *if duly authorized by act of Congress*, would constitute an unreasonable search and seizure within the fourth amendment.

III.

The Commission is seeking only such information from the records and correspondence of the carrier as it has authority to obtain by the act to regulate commerce.

The matters set out in the Senate resolution are all within the visitorial power conferred by Congress upon the Interstate Commerce Commission. The Senate resolution in substance directed the Commission to investigate (1) the amount of stocks and bonds or other securities of the Nashville, Chattanooga & St. Louis Railway owned and controlled by the Louisville & Nashville Railroad

Company; (2) the facts tending to show whether the relations between the Nashville, Chattanooga & St. Louis Railway and the Louisville & Nashville Railroad Company are such as to restrict competition by the maintenance of fixed freight and passenger rates; (3) whether the ownership of terminals at certain points connecting with steamship lines by the Louisville & Nashville Railroad Company affects freight and passenger rates by restricting competition; (4) if there has been an elimination of competition among the interstate carriers specified as a result of the rates charged by said carriers; (5) information respecting free passes for the transportation of passengers by the carriers named.

It is obvious that the subjects named in the Senate resolution are all expressly covered by the act and specifically placed under the jurisdiction of the Commission. Sections 13 and 15 authorize the Commission to make such orders as it may think proper after a full hearing in a general investigation had upon its own initiative. Not only is the Commission fully authorized to conduct an investigation such as this, but in the Commission resides the ultimate and exclusive power to make any orders that may be appropriate to meet the exigencies of the situation. The subjects of investigation stated in specification 1 are cognizable by the Commission under sections 1, 5, 6, 13, 14, and 15 of the act to regulate commerce which cover investigations concerning the reasonableness of charges

for transportation, the pooling of freight, and the maintenance of established rates. The subjects referred to in specifications 2, 3, and 4 are embraced in section 5 of the act, and specification 5, relating to free passes, is covered by section 1 of the act. The fact that some of the matters set out in said resolution might involve violations of the antitrust law in no way destroys the jurisdiction of the Commission with respect to these same subjects. In view of the purpose for which the Commission was created and the express powers delegated to it by the act to regulate commerce, the jurisdiction of the Commission over the matters set out in the Senate resolution is apparent.

The suggestion was made, in the opinion of the court below, that the resolution of the Senate is not law, and can not be construed to supplement the powers of the Commission, and that such powers are inadequate for the present proceeding.

It is respectfully submitted that the Commission needs no aid to its powers to investigate the matters referred to in the Senate resolution. The authority to investigate matters affecting interstate transportation has been expressly conferred by the act to regulate commerce, and this power has been declared constitutional and has been recognized and applied in numerous cases.

The resolution of the Senate has direct and specific reference to the maintenance of the published rates, charges for transportation, competitive methods, the pooling of freight, and issuance

of free passes. The purpose being to discover and bring to light methods, devices, or practices that affect the charges made by the railroads for transportation or that produce discriminations or preferences or that result in any violation of the act.

The Interstate Commerce Commission has a broad and absolute jurisdiction to investigate matters of this nature. One of the purposes of its creation was to perform services of this character and to suggest remedies for the evils discovered. Its remedial and beneficial character has led the courts to construe the terms of the act liberally and to widen its scope and to free it from narrow application and technical objections.

(A) The Harriman case, 211 U. S. 407.

The questions propounded to Harriman and Kuhn related to their *private* ownership of stocks. There is no analogy, helpful to the defendant, between the Harriman case and the proceeding under review. The Harriman case was decided upon the theory that it involved the *private* affairs of a private individual, the present case is clearly that of a *public-carrier corporation* over which the Government has the most complete visitatorial powers. *We have here no question of evidence, or of production of evidence in court. It is a question of the right to inspect regardless of the evidential value of the papers inspected.* Moreover, the Commission is in the instant case investigating matters which might have been made the subject of complaint, in which event the Harriman case is authority for compelling the production of the evidence desired. The mat-

ters stated in the resolution might have been made the object of complaint under various sections of the act, namely, reasonableness of the rates of the defendant and the free-pass provision of the first section, the pooling of freight of different and competing railroads, and the ownership or control of competing water lines under section 5, and the maintenance of the established rates under section 6, all of which matters the Commission is not only empowered to investigate, but is charged with the duty of investigating without regard to any authority conferred by the Senate resolution.

With respect to the power of the Commission under section 20, the court in the Harriman case said, page 421:

> The only other section that is thought to sustain the argument for the commission is section 20, amended by act of June 29, 1906. This authorizes the commission to require annual reports from all the carriers concerned, with details of what is to be shown, to which the commission may add in certain particulars, and, further "to require from such carriers specific answers to all questions upon which the Commission may need information." The commission may require certain other reports, and is to have *access to all accounts, records, and memoranda.* The section now deals at length with this matter and how accounts shall be kept and the like. It seems to us plain that it is directed solely to accounts and returns *and is imposing a duty on the common carrier only from whom the returns come.* [Italics ours.]

Here the court by plain inference states that section 20 imposes a duty upon the carrier to give the Commission access to all accounts, records, or memoranda. This is the duty sought to be enforced in this proceeding.

In the Harriman case the court had under consideration the constitutional rights of the *individual,* while in this case we are dealing with the functions performed by the Commission under its visitatorial powers over *railroad corporations.*

IV.

The Commission has authority to obtain through its agents or examiners full and complete information concerning all business done by a common carrier subject to the provisions of the act to regulate commerce, even though some of that business should not be within the regulatory power of the Commission.

While it seems quite clear that all of the subjects covered by the Senate resolution are plainly within the jurisdiction of the Commission under the act, the Commission would still have jurisdiction even if some of the matters were beyond its regulatory power.

The cases of *Interstate Commerce Commission* v. *Goodrich Transit Company,* and *United States* v. *White Star Line,* 224 U. S. 194, involved orders of the Commission requiring the appellees, which were common carriers subject to the act, to keep certain of their accounts in accordance with forms prescribed by the Commission, and to make reports to the Commission which should include all the

business done by them, notwithstanding that more than eighty per cent of the revenues of the Goodrich Transit Company and more than ninety-nine per cent of the revenues of the White Star Line were derived from business not within the regulatory power of the Commission (ib. 204). In holding the orders to be within the power of the Commission, the Supreme Court, in its opinion submitted through Mr. Justice Day, called attention to the authority conferred upon the Commission by section 20 of the act, and then said, page 211:

> We think this section contains ample authority for the Commission to require a system of accounting as provided in its orders and a report in the form shown to have been required by the order of the Commission. It is true that the accounts required to be kept are general in their nature and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned. If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations and favoritism, it must be informed as to

the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see and concerning which it can require no information. It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business. The necessity of keeping such accounts has been developed in the reports of the Commission and has been the subject of great consideration. It caused the employment of those skilled in such matters, and has resulted in the adoption of a general form of accounting which will enable the Commission to examine into the affairs of the corporations, with a view to discharging its duties of regulation concerning them.

The fact, therefore, that some of the business covered by the Senate resolution or by the letters

and copies of letters in question may not be within the *regulatory* power of the Commission can not defeat the *visitatorial* power of the Commission.

V.

The Commission, under the visitatorial power conferred upon it by the act to regulate commerce, may examine the records of the correspondence prior to August 28, 1906, as well as subsequent thereto, the date mentioned being the date the Hepburn Act became effective.

The Commission has power to examine the records of a carrier under the visitatorial authority conferred by section 12, irrespective of the provisions of the Hepburn Act contained in section 20. Section 12 is a part of the act enacted in 1887, while the portion of section 20 under consideration is a part of the Hepburn Act, which became effective August 28, 1906. Even if we assume that the visitatorial power of the Commission depends upon the Hepburn Act, that act would give authority to the Commission to examine the records of the carrier both prior to and subsequent to the passage of the act, there being no vested right in the carrier of keeping its records secret from the Government. The doctrine of retrospective operation of laws has no application in this case. There is no question involved of impairing a vested right or imposing a new duty, or attaching a new disability in respect to transactions or considerations already past. Laws effecting remedies are not within the scope of retrospective laws. En. U. S. Sup. Court, Vol. 4, pp. 432, 442, and cases cited.

VI.

Mandamus is the proper remedy to enforce the visitatorial power of the Commission.

The lower court in disposing of the case proceeded upon the idea that the writ of mandamus was employed to enforce the resolution of the Senate, whereas the writ (which was expressly given by statute for the purpose) was used by the Commission to aid it to carry out and give effect to the provisions of the act to regulate commerce. It became the duty of the Commission, under section 12, to execute and enforce the provisions of the act; and the same section says, "And upon the request of the Commission it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute, under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this act." Section 20 provides that the district court may issue a writ of mandamus commanding the common carrier to comply with the provisions of the act. The defendant having refused to comply with the provisions of the act by denying access to its records, it was the duty of the Commission to apply for the writ. The Commission was not endeavoring to enforce the Senate resolution as such by the writ of mandamus, but it was employing this writ under the authority of the act to regulate commerce to carry out a solemn duty imposed upon the Commission.

The court further says that the "resolution under no admissible interpretation relates to interstate commerce as regulated by the act." We have shown elsewhere in this brief that every specification of the Senate resolution relates to interstate commerce as regulated by the act.

The court further holds that the granting of the writ is always a matter of sound discretion, and because of the grave doubts that exist as to the question of privileged communications, the retrospective operation of the law, the vague allegations of the petition, and the court's inability to clearly define the duty the writ would impose, it seemed to the court that the writ should be denied and the action dismissed.

While granting the writ has been said to be a matter of sound discretion, this does not mean that it is an arbitrary matter with the judge, but it means judgment according to law based upon the facts of each case; that discernment which enables a person to judge critically of what is correct and proper; when applied to a court of justice it means sound discretion guided by law. It must be governed by rule, not by caprice. It must not be arbitrary, vague, and fanciful, but legal and regular. *Words and Phrases,* vol. 3, p. 2045. In the case of *Osborne* v. *United States Bank,* 22 U. S. 865, Chief Justice Marshall, speaking for the court, said:

> Judicial power, as contradistinguished from the power of the laws, has no existence.

> Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.

VII.

The lower court held that the correspondence desired to be examined should be specified and its contents exactly stated in the petition. It is manifestly impossible to know what is contained in the correspondence until it is examined, and the purpose of the examination is to ascertain if the correspondence contains any matters germane to the investigation by the Commission.

The lower court stated in its opinion, as a further reason for denying the writ, that the correspondence and contents thereof were not definitely described in the petition. It is respectfully submitted that it would have been impossible to set out in the petition with particularity and certitude the contents of the correspondence without knowledge of such contents. This knowledge could only be acquired by an examination of the correspondence; and if the Commission had that knowledge the examination of the papers and letters would not be

necessary. The prayer of the petition specifies clearly and definitely the exact relief desired; that is, in the language of the statute, access to the accounts, records, and memoranda of the defendant. This is a sufficient discription in a petition for mandamus to enforce the visitatorial power of the Commission under the act to regulate commerce.

In case of *Consolidated Rendering Company* v. *Vermont*, 207 U. S. at page 553, the Supreme Court said:

> We see no reason why all such books, papers, and correspondence which related to the subject of inquiry and were described with reasonable detail, should not be called for and the company directed to produce them. *Otherwise, the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.* The notice is not nearly so sweeping in its reach as in the case of *Hale* v. *Henkel, supra.*

The position of the defendant railroad appears to be because some of the letters and correspondence *are alleged by it* to be personal and privileged, therefore *all* of its letters and correspondence by this mere *allegation* become exempt from visitation. A contention somewhat similar was passed upon in the case of *Consolidated Rendering Company* v. *Vermont, supra.* In that case the court said, page 553:

> Obviously the company could not by its refusal to produce the books thereby entirely conclude the court from any examination whatever into the sufficiency of the excuses for such nonproduction. Otherwise, the company could disobey at its pleasure, and so prevent any inquiry into the merits of the excuses. *The statute might as well not exist if this were to be permitted.*

The power of visitation over a public-service railroad sought to be exercised by the Interstate Commerce Commission in this case is far more comprehensive than the authority invoked, in the case just cited, to compel the production of certain books and papers of a private *business corporation* before a grand jury.

VIII.

CONCLUSION.

In the light of these principles, that a corporation is a creature of the State; that it is a legal entity, invisible, intangible, and existing only in contemplation of law; that it possesses only such life and such powers as are given by law; that it is at all times subordinated to the requirements of law and answerable to its demands, how can it be successfully maintained that a public-service corporation, like the defendant, may secrete a part of its records from the Government and vitiate the regulating statutes by calling its records and documents *private* letter files, and asserting on that account immunity from visitation? The statutes and de-

cisions of the courts demolish such a contention, so utterly opposed to right and to reason.

The counsel for the Louisville & Nashville Railroad Company declared in their brief in the court below, "Certainly the time has not yet come when there is nothing private or confidential in the management of a carrier engaged in interstate commerce." The answer is that the time has come—indeed, has never been otherwise since the Government has had the power of visitation. The operation of a railroad is not the private concern of those who run it, but it is charged with the public use and subject to public regulation and governmental visitation. There can be nothing private or confidential in the management of a carrier engaged in interstate commerce as against the visitatorial power of the Government.

Respectfully submitted.

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